JUL 1956
JOHN T. FEY, Clerk

No. 237

IN THE

Supreme Court of the United States

October Term, 1956

ALBERT H. SMITH, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

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Albert H. Smith, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed the judgment of the United States District Court for the District of Columbia.

OPINION BELOW

The District Court filed no opinion. The opinions of the Court of Appeals originally and on petition for rehearing are not yet officially reported but are set forth

in the appendix to this petition (App. *infra* pp. 20 *et seq.*)

JURISDICTION

The judgment of the Court of Appeals was entered April 30, 1956 (Joint App. 102). A timely petition for rehearing was denied June 12, 1956, and the opinion of the Court thereon is set forth (App. *infra* 36). The jurisdiction of this Court is invoked under *28 U. S. C. 1254(1).*

STATUTES INVOLVED

Title 18, Section 371, United States Code:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 22, Section 704, District of Columbia Code (1951):

"Whosoever corruptly, directly or indirectly, gives any money, or other bribe, present, reward, promise, contract, obligation or security for the payment of any money, present, reward, or thing of value to any ministerial, administrative, executive, or judicial officer of the District of Columbia or any employee or other person acting in any capacity for the District of Columbia, or any agency thereof, either before or after he is qualified, with intent to influence his action on any matter which is then pending, or may by law come or be brought before him in his official capacity, or to cause him to execute any of the powers in him vested, or to perform any duties of him required, with partiality or favor, or otherwise than is required by law, * * * shall be deemed

guilty of bribery and upon conviction thereof shall be punished by imprisonment for a term not less than six months nor more than five years."

Title 47, Section 605, United States Code:

"* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto."

QUESTIONS PRESENTED

Whether petitioner was substantially prejudiced when a severance was denied him under the circumstances of this case. The indictment contained a conspiracy count charging petitioner and seven others with conspiracy to bribe a police officer. It also contained 18 counts charging various defendants singly or in concert with two or three other defendants, but never as a body, on eleven separate dates beginning April 16, 1953 and continuing until September 14, 1954, with the substantive offense of bribery.

The testimony to prove the conspiracy count and the 18 substantive counts was interwoven throughout a long trial in which petitioner was charged in only one sub-

stantive count of which he was convicted. Severance was the only remedy available to avoid substantial prejudice.

II

May the prosecution present only a part of a conversation magnetically recorded between a defendant and the investigating police officer. The entire conversation was not offered due to a defective apparatus in that the spool of the recording wire "ran out" during the conversation. This Court should determine the scope and propriety of the use of magnetic recordings by law enforcement officers.

III

Was the petitioner prejudiced by evidence introduced in the trial which "led" from a tapped telephone wire conversation between one of the defendants and a police officer contrary to the holding in *United States* v. *Coplon*, 185 F. 2nd. 629 (CCA2)

STATEMENT OF THE CASE

Petitioner Smith and seven others were, under *Title 18, Section 371, United States Code*, indicted in the District of Columbia for conspiracy to bribe Lt. Thoman, a member of the Metropolitan Police Department, Washington, D. C. The purpose of the conspiracy was to wrongfully influence the official conduct of the police officer in the performnace of his police duties, contrary to *Title 22, Section 704 of the District of Columbia Code.*

The indictment charged that the conspiracy among the indictees commenced sometime prior to October 29, 1953, and continued until September 14, 1954. Twenty-six

overt acts to further the conspiracy were alleged to have occurred at various places in the District of Columbia on the following dates during that period, viz.:

> October 29, 1953, November 17, 1953, November 24, 1953, April 14, 1954, April 16, 1954, May 20, 1954, May 21, 1954, May 22, 1954, May 23, 1954, June 3, 1954, June 9, 1954, June 21, 1954, June 29, 1954, July 1, 1954, July 3, 1954, July 7, 1954, July 9, 1954, August 18, 1954, August 19, 1954, September 9, 1954, and September 14, 1954.

Smith was alleged to have participated in three of those overt acts which occurred on June 9, 1954, and June 21, 1954 (See overt acts Nos. 13, 14 and 15, Joint App. p. 13). Smith and all other defendants save two, who were officers of the Metropolitan Police Department, Washington, D. C., were acquitted of conspiracy.

The indictment also contained 18 substantive counts which alleged the bribery of the same Lt. Thoman on various dates and at variant places in the District of Columbia from April 16, 1954, and continuing until September 14, 1954, by the various defendants, or the receipt of bribes by defendants Capt. Monroe and Sgt. Prather.

Eleven of the substantive counts (Nos. 2, 3, 4, 6, 7, 8, 9, 12, 16 and 19) alleged that on April 16, 1954, May 20, 1954, May 23, 1954, June 29, 1954, twice on July 3, 1954, July 7, 1954, July 9, 1954, August 18, 1954, August 19, 1954, September 9, 1954, and on September 14, 1954, Thoman was bribed by defendants other than Smith. It was neither alleged nor proved that Smith had any part in these transactions. Six of the remaining substantive counts (Nos. 10, 11, 13, 14, 17 and 18) alleged that on July 9, 1954, August 19, 1954, and September 14, 1954, Capt. Monroe, one of the defendant police officers, accepted bribes from the defendant King. Smith was in no manner connected with these transactions.

In count 5, the only remaining count, Smith, Simkins and Anderson were charged with bribing Thoman on June 9, 1954, to violate his trust as a police officer. Anderson was acquitted. Smith and Simkins were convicted.[1]

At the trial, the Court charged and the Government contended that Smith was an aider and abettor of Simkins in the bribery of Thoman (Tr. 3025).

Smith requested a severance because prejudice would necessarily result to him from the commingling of the evidence submitted to sustain all 18 substantive counts of the indictment as well as the conspiracy count coupled with its 26 overt acts. The intermingling of evidence was particularly prejudicial in the pattern of this case for the reason that the trial of Smith for the offense alleged in count 5 could not have been joined under *Rule 8, F. R. Cr. P.* except for the conspiracy count upon which he was acquitted.

REASONS FOR ALLOWANCE OF THE WRIT

Because of the joinder of a conspiracy count with the 18 substantive counts charging bribery, 17 of which substantive counts concerned others than Smith, all of which occurred on different dates and at varied places in the District of Columbia, prejudice was inevitable and severance should have been granted.

In disposing of Smith's motion for severance, the Court below said: (Appendix *infra*, p. 31):

> "The remaining point requiring discussion is the contention of appellants that the conviction of each must be reversed because each was prejudiced in his

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[1] The evidence adduced to sustain count 5 was interwoven in the proof to establish overt acts Nos. 13 and 14 of the conspiracy count.

> defense by the trial of all substantive charges together, and with the conspiracy charge. Except for the appellant Smith, however, no appellant reserved this point clearly on the record either before, during, or after trial. * * * Since the offenses charged were of the same or similar character, and the defendants were alleged to have participated in the same conspiracy, the joinder of offenses and defendants in the indictment itself was permissible under *Rule 8, Fed. R. Crim. P.*"

There is presented for consideration in this petition, the question of prejudicial variance because of an allegation of one conspiracy and proof of more than one, such as was before this Court in *Kotteakos* v. *United States, 328 U.S. 750, Blumenthal* v. *United States, 332 U.S. 539,* and *Berger* v. *United States, 295 U.S. 78,* which the Court below disposed of (assuming arguendo, its existence) by holding it was not available to Smith because he was acquitted (App. *infra* 31). There is in addition, the question of whether in the circumstances of this case a severance should have been granted in order to meet the essential demands of justice.

The doctrine of the cases hereinbefore mentioned is based upon the prejudice which necessarily results upon the presentation of evidence in a mass trial of several unconnected crimes not part of a common scheme or plan. This case presents an aggravation of the rationale of the rule announced in those authorities. Otherwise, by adopting the simple expedient of charging a conspiracy, no matter how ill-founded, the prosecution places a distinct and heavy burden upon a defendant situated such as the petitioner was here and the task of the prosecutor is lightened because of the application of the adage "birds of a feather flock together."

The language of *Canella* v. *United States, 157 F. 2nd. 470, 478,* is apposite:

> "But in *Kotteakos* v. *U.S. (328 U.S. 750),* the

> Supreme Court found that the burden of defending a person connected with only one of so many separate transactions was far greater than when only two transactions were involved as in the Berger case. This 'sheer difference in numbers' (66 S. Ct. 1249) was crucial since 'numbers are vitally important in trial, especially in criminal matters. * * * When many conspire, they invite mass trial by their conduct. * * * (but) wholly different is it with those who join together with only a few * * *.'"

This Court in *Kotteakos* v. *United States*, supra, said that numbers were vitally important when more than one conspiracy is charged. We submit that the posture of this case was such that numerous unconnected counts which could not have been joined except for the conspiracy count were devastating to a fair and impartial trial. This contention is not presented to this Court because of the benefit of hindsight. Smith realized that a fair and impartial trial could not reasonably be had and moved for a severance immediately after the opening statement of the prosecutor (Tr. 188). It was then that danger became apparent. The motion was renewed at the close of the case when we knew that the danger definitely existed (Tr. 2651).

The question is simply one of the practical effect upon the trial as a whole. All of the circumstances must be regarded. Smith lost his identity in such a mass trial and severance was the only remedy.

In *Kotteakos* v. *United States*, *328 U.S. 750, 733*, this Court said:

> "When many conspire they invite mass trial by their conduct. Even so the proceedings are exceptional to our tradition and call for the use of every safeguard to individualize each defendant in his relation to the mass.

In speaking of substantial rights in that case, this Court said:

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"That right in each instance was the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others as shown by this record."

and at page 776:

"We have not rested our decision particularly on the fact that the offense charged, and those proved, were conspiracies. That offense is perhaps not greatly different from others when the scheme charged is tight and the number involved small. But as it is broadened to include more and more, in varying degrees of attachment to the confederation, the possibilities for miscarriage of justice to particular individuals become greater and greater. Cf. *Gebardi* v. *United States*, 287 U. S. 112, 122, note 7, 77 L. ed. 206, 211, note 7, 53 S. Ct. 35, 84 ALR 370, citing *Report of the Attorney General* (1925) 5, 6, setting out the recommendations of the Conference of Senior Circuit Judges with respect to conspiracy prosecutions. At the outskirts they are perhaps higher than in any other form of criminal trial our system affords. The greater looseness generally allowed for specifying the offense and its details, for receiving proof, and generally in the conduct of the trial, becomes magnified as the numbers involved increase. Here, if anywhere, cf. *Bollenbach* v. *United States*, 326 U. S. 607, ante, 350, 66 S. Ct. 402, supra, extraordinary precaution is required not only that instructions shall not mislead, but that they shall scrupulously safeguard each defendant individually, as far as possible, from loss of identity in the mass. Indeed, the instructions often become, in such cases, his principal protection against unwarranted imputation of guilt from others' conduct. Here also it is of special importance that plain error be not too readily taken to be harmless."

Here, the offenses charged were both conspiracy to bribe and bribery. Joinder of the various defendants and offenses was permitted because of the conspiracy count.

In such a setting, severance was the appropriate remedy. Smith asked for it.

The authorities dealing with fatal variance, such as *Kotteakos, Blumenthal* and *Berger*, supra, are all conspiracy cases where the appellants were convicted. Here, Smith and five other defendants out of a total of eight defendants were acquitted of the conspiracy. Two were convicted of conspiracy. Is the danger of prejudice from contamination because of mass trial less when acquittal occurs on the very count which permitted joinder than when one is convicted? We submit not.

The degree to which prosecutors have eagerly availed themselves of a joinder of broad conspiracy counts with substantive counts, to insure for themselves a conviction of particular defendants, has been the subject of unfavorable comment by Justices of this Court. See e.g., *Krulewitch* v. *United States, 336 U.S. 440, 445-458* (concurring opinion); *Report of Conference of Senior Circuit Judges, 1925*, cited in *Pinkerton* v. *United States, 328 U.S. 640, 644 at fn. 4.*

The heavy burden which a defendant must overcome in this type of a case was discussed in *Lutwak* v. *United States, 344 U.S. 604, 619:*

> "Even then, in most instances of a conspiracy trial of several persons together, the application of the rule places a heavy burden upon the jurors to keep in mind the admission of certain declarations and to whom they have been restricted and in some instances for what specific purpose."

The dissenting opinion in that case decried the fact that:

> "One of the additional leverages obtained by the prosecution through proceeding as for conspiracy instead of as for the substantive offense is that it may get into evidence against one defandant acts or omissions which color the case against all." (344 U.S. at 623).

Except for the conspiracy count, the charge against Smith in count five could not have been joined with the remaining substantive counts. The sheer force of the number of defendants as well as the character of the crime which strikes at the foundation of law enforcement shows that the utmost caution should have been used. Prejudice to Smith becomes crystal clear in the setting of this case and no charge by the Court could remedy the prejudice and evil which necessarily attached to petitioner.

The trial Court gave a comprehensive charge indicating that on the substantive counts each defendant should be judged on the evidence presented against him alone. We did not and could not complain of it. However, the harm had been done. Consciously or otherwise, the jury may have required a lesser degree of proof by reason of the mass trial of offenses and defendants and the intermingling of the evidence.

In *Blumenthal* v. *United States*, *332 U.S. 539, 559, 92 L. Ed. 169*, this Court said:

> "That danger was real. It is one likely to arise in any conspiracy trial and more likely to occur as the number of persons charged together increases. Perhaps even at best the safeguards provided by clear rulings on admissibility, limitations of the bearing of evidence as against particular individuals, and adequate instructions, are insufficient to ward off the danger entirely. It is therefore extremely important that those safeguards be made as impregnable as possible."

The motion to sever should have been granted. Of course, normally this rests in the discretion of the Court and is governed by *Rule 14, F. R. Cr. P.*

However, in *United States* v. *Haupt*, 136 F. 2nd. 661, 672 (CCA 7th), it was held:

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"The crux of the attack upon the alleged unfairness of the trial revolves in the main around the court's denial of defendant's motion for severance. It is earnestly insisted that it was impossible under the circumstances for the individual defendants in a joint trial to obtain a fair and impartial hearing. We are mindful, of course, of the well-established rule that the matter of severance is one within the discretion of the trial court and ordinarily not subject to review. This discretion, however, like any other vested in the trial court is, if abused, subject to review and correction. The main argument as to the alleged unfairness of a joint trial has to do with the prejudicial effect of certain evidence offered by the government."

* * * * *

"True, as the government asserts, such statements were offered in evidence only against the defendant by whom made, and the court instructed the jury accordingly. A reading of these statements, however, leaves no room for doubt but that they were damaging not only as to the defendants against whom offered but as to all others. We doubt if it was within the realm of possibility for this jury to limit its consideration of the damaging effect of such statements merely to the defendant against whom they were admitted. We have equal doubt that any jury, or for that matter any court, could perform such a herculean feat."

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"The court's action and the exercise of its discretion are to be judged by the circumstances and facts thus presented."

This Court's attention is invited to *Schaffer* v. *United States (CCA 5th) 221 F. 2nd. 17, 19,* where the same doctrine was announced. See also *United States* v. *Lotsch (CCA 2nd), 102 F. 2nd. 35, 36.*

A mass trial such as was had here, producing testimony taking over a month to present, causes grave dan-

ger to any defendant. There is ever present the risk and real peril that the jury will transfer, consciously or otherwise, the testimony to prove the conspiracy count to the substantive counts.

Mr. Justice Jackson in his concurring opinion in *Krulewitch* v. *United States, 336 U. S. 440, 445, 93 L. Ed. 795, 800* stated:

> "It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together."

Mr. Justice Jackson was speaking of the admissibility of evidence. Here, we are dealing with joinder of counts permissible only because of the conspiracy count, based upon concert of action which we now know did not exist. This was the vehicle for the introduction of evidence showing the commission of many offenses by defendants, other than Smith and with whom he was not connected. The trial took 24 days to complete. The evidence to prove the allegations of count 5 in which Smith was charged with the substantive offense took less than a day. The burden upon the jury to separate the wheat from the chaff was too heavy to secure fairness. Smith was entitled to have his own case stand on its merits.

The selectivity of the jury's verdict as quoted by the Court below could very well have been a compromise, particularly in view of the jury's statements to the Court at one time during its deliberation that it could not agree (Tr. 3067).

As said in *Marcante* v. *United States (CCA 10th, 1931) 49 F. 2nd. 158:*

> "It is extremely difficult for an experienced trial judge to trace the skeins of scattered testimony to so many individuals; with inexperienced jurors such complicated testimony is too apt to become but a confused jumble, and a verdict too apt to represent

> an impression that the defendants are guilty of something, with little reference to the crime with which they are charged."

Although the conspiracy among the various defendants was alleged to have existed from sometime prior to October 29, 1953, and continued to September 14, 1954, the prosecution conceded at the trial that as of July 3, 1954, Smith was no longer a part of the conspiracy (Tr. 1190). The substantive count against Smith involved the one date only, June 9, 1954. The verdict establishes he never was a part of the conspiracy nor were any of the other defendants except the police officers Monroe and Prather. This also indicates that Smith's motion for severance should have been granted in the setting of this case.

The conspiracy count permitted the introduction of evidence of other crimes, allegedly occurring after the date upon which count 5 was based and of statements made outside the presence of Smith.

The Government was permitted to show that on July 3, 1954, Thoman had a conversation with the defendant Simkins. Smith was not present (Tr. 1127). There Simkins stated that Smith wanted him to go into the number business in Maryland (Tr. 1127) and that Smith also wanted Simkins to give to him (Smith) money in order to buy protection (bribery) in Maryland (Tr. 1128).

A recording of a conversation between Simkins and Thoman on July 3, 1954, was introduced in evidence. Smith was not present. The evidence was to the effect that Simkins said Smith was stealing from him (Tr. 1127, 1219, 1223).

On September 14, 1954, there was a conversation between Simkins and Thoman. Smith was not present (Tr. 1509). During that conversation, Simkins told Thoman that Smith wanted $2,500 from Simkins to take care of somebody (Tr. 1509). Obviously this meant bribery.

This type of testimony, which was limited by the Court's charge to the conspiracy count, of necessity adversely affected Smith on the substantive count of bribery. The Court's very comprehensive charge could not remove the real danger of the commingling by the jury of the testimony on the two counts. It would be naive indeed to think otherwise.

The number of counts involved, the tenuous character of the conspiracy as evidenced by the verdict, shows that the circumstances of this case called for a severance as outlined in *United States* v. *Haupt*, supra; and *Schaffer* v. *United States*, supra.

On this point the Court should grant the writ as prayed and summarily reverse, such as was done in *Smaldone* v. *U. S.*, 348 U. S. 961.

II

THE MAGNETIC RECORDINGS AS INTRODUCED IN THE TRIAL WERE NOT ADMISSIBLE

Magnetic recordings of conversations had between an investigative officer (Lt. Thoman) and the various defendants in the conspiracy count were introduced over objection against all the defendants at trial. Similar recordings of a conversation had on June 9, 1954, among petitioner Smith, a co-defendant (Simkins) and Lt. Thoman were introduced to sustain the allegations of count five upon which petitioner was convicted. This recording was incomplete because of a mechanical defect in the recording apparatus. The opinion of the Court below describes the use of this evidence and the manner in which it was obtained (App. infra 25, 26). The investigating officer testified that the entire recording of the conversation on June 9, 1954, hereinbefore mentioned, was not recorded because, as he said: "The spool ran out

three minutes before the conversation ended" (Tr. 951-958). The question presented here is whether recordings, which are incomplete because of a defect in the recording machine and do not contain the full conversation of the parties are to be considered as similar to inaudible recordings such as were before the Court in *United States* v. *Schanerman (CCA 3rd) 150 F. 2nd. 941,* and hence admissible in evidence. There, the court held that recordings which were partially inaudible were admissible because the situation was comparable to one where a witness could not remember the entire conversation.

There are but few authorities specifically on the point. Partial recordings were rejected in *Hunter* v. *Hunter, 169 Pa. Super. Ct. 498, 83 A. 2nd. 401, 403,* where the Court said:

> "But since parts of what was said by defendant on all of the occasions are lacking, the recordings on that ground alone are not admissible against her. In general such conversations are admissible as a whole, or not at all."

In *Wright* v. *State, 262 Ala. 420, 79 S. 2nd. 66,* the Court compared a partial recording to a confession which was not completely reduced to writing. That Court quoted from *Williams* v. *State, 39 Ala. 532 (1865),* where it was said: (Page 72)

> "A partial and unfinished statement of this kind should not be received in evidence. We cannot fairly judge a writer or speaker on any given topic upon the most ordinary occasions of life until we have heard all he has to say on that topic, and when he has spoken, we are required to consider together all he has said and are not allowed to garble. That which common fairness and justice universally forbid in the most ordinary and even insignificant affairs of life, the law cannot sanction as a rule of evidence."

The admissibility of magnetic recordings generally is discussed in *Wigmore, Vol. II, 3rd Ed., Sect. 669, page 790, note 4; 40 Va. Law Review No. 1, 23 (January 1954),* and an annotation in *168 A. L. R. 927,* et seq.

The situation here is not comparable to one where the memory of a witness is faulty as to details, or one who did not hear the whole conversation. When a witness remembers only a part of a conversation, he is subject to cross-examination.[1] The jury can evaluate the testimony of such a witness by his demeanor, manner of speaking, his interest, bias or other criteria of responsibility.

The situation here is similar to admitting part of a conversation between the accused and the prosecuting witness, but denying to the defendant the right to cross-examine the witness relative to the scope of the entire conversation. See generally, *20 Am. Jur. Section 551, page 463,* et seq.

In *Commonwealth* v. *Britland, 300 Mass. 492, 15 N. E. 2nd. 657, 118 A. L. R. 132,* the Court said:

> "In *Commonwealth* v. *Goddard,* 14 Gray 402, at page 404, the court said: 'No principle is more familiar than that if one party puts in evidence a part of the admissions or conversations of the other, the latter is entitled to produce, *or draw out by cross-examination, testimony concerning all that was said upon the occasion referred to.* This is essential to render the part produced in evidence intelligible. The force and effect of particular expressions may be, and often are, greatly modified or affected by the connection in which they are uttered.'" (emphasis supplied)

Among the objections interposed to the recordings, counsel stated that the instrument was not subject to cross-examination (Tr. 329-347, 467-472, 807-814).

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[1] See *Wigmore, Volume 7, 3rd Ed., Section 2094, page 465,* et seq. Annotation *118 A. L. R. 138, 139.*

In *United States* v. *Moran, 194 F. 2nd. 623, 626 (CCA 2nd. 1952)*, the Court held that the introduction in evidence of a film which portrayed the defendant's demeanor on the witness stand before a Senate subcommittee for a period of only ten minutes out of a total of three hours could have been remedied by counsel's request for the entire film. Here, however, it was impossible to have the recording of the whole conversation, and the admission of such recordings was error.

Because of the novelty of the character of such testimony, this Court should dispose of this question.

III

There is also presented for consideration by this Court, the question whether *Title 47, Section 605, United States Code (Communications Act)* prohibited the introduction of evidence against Smith which "led" from unauthorized wiretapping.

On June 9, 1954, Anderson, who was one of the defendants, phoned Thoman and arranged for a meeting between Thoman and the defendant Simkins (Tr. 879). As a result of that phone call, which was monitored without Anderson's knowledge in the manner set out in the opinion of the Court below (App. infra p. 29, 30), Thoman met Simkins, one of the defendants, and joined him in the front seat of Simkins automobile. A few minutes thereafter, they stopped and picked up Smith who got into the rear of the car. Shortly thereafter the driver Simkins passed to Thoman who was seated next to him, $500 as a bribe (Tr. 887).[1]

The testimony was objected to because of a violation of the *Communications Act*. The "fruit of the poisonous tree doctrine" as announced by this Court in *Nardone* v. *United States, 308 U. S. 338, 341*, was invoked.

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[1] The trial Court instructed the jury that Smith was charged as an aider and abettor of Simkins. (Tr. 3025).

Because the telephone conversation "led" directly to the meeting between Simkins and Thoman, and the subsequent bribery of Thoman by Simkins on June 9, 1954, the evidence was inadmissible under the doctrine announced in *United States* v. *Coplon (CCA 2nd) 185 F. 2nd. 629, 636,* where the Court said:

> "The next question is of the 'taps' taken after January 6th. It is of course well-settled law that 'wiretapping' is forbidden by statute; and that evidense obtained by a federal officer in violation of law may not be used against the victim of the violation. In *United States* v. *Goldstein,* 120 F.2, 485, 488, we declared what, as we understood the law, was the consequence of wiretapping.' The accused has the burden of proving that the prosecution has in fact 'tapped' his wires; but, if he succeeds in doing so, the burden falls upon the prosecution to prove that the information so gained has not 'led' directly or indirectly, to the discovery of any of the evidence which it introduces."

The Court also stated (page 637) that the prosecution has the burden of showing that the "taps" had not "led" to any evidence introduced at the trial.

There was no evidence in this case relative to Smith except that which developed from the telephone call of June 9, 1954, between Anderson and Thoman. That testimony was inadmissible. The case against Smith was not established.

CONCLUSION

The petition should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12683

JOHN B. MONROE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 12684

GEORGE C. PRATHER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 12685

ROGER W. SIMKINS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 12686

CURTIS M. TAYLOR, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 12687

ALBERT H. SMITH, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 12689

CHARLES ANDERSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 12690

BURNIE KING, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeals from the United States District Court for the District of Columbia

Decided April 30, 1956

Before WILBUR K. MILLER, FAHY and DANAHER, Circuit Judges.

FAHY, *Circuit Judge*: These are appeals from convictions under 62 Stat. 701 (1948), 18 U.S.C. § 371 (1952), for conspiring to violate § 22-704, D. C. Code (1951) by bribery, and from convictions of bribery itself. The conspiracy and bribery were directed toward influencing the official conduct of Lieutenant Todd O. Thoman, Jr., of the Metropolitan Police Department, to perform his duties with partiality and favor, and otherwise than as required by law in the enforcement of the gambling laws of the District of Columbia. Lieutenant Thoman was entirely innocent of wrongdoing. In fact he uncovered the allegedly criminal conduct by permitting himself seemingly to participate therein, while at the same time reporting the unfolding events to his superior officers and assembling evidence in preparation for arrests.

The indictment contains nineteen counts. Count one covers the conspiracy. The eighteen other counts cover specific acts of bribery. All appellants, together with John Winston, who was acquitted, were charged in the conspiracy count and were also charged with bribery in one or more other counts.

Two appellants, Monroe and Prather, were members of the Metropolitan Police Department. They are the only ones who were convicted of conspiracy. Monroe was also convicted of three charges of bribery.[1] Prather was acquitted of bribery, so that his appeal brings in question only his conviction with Monroe of conspiracy. Appellant Anderson was convicted of three charges of

[1] He was acquitted of three bribery counts.

bribery and acquitted of three; King was convicted of one charge of bribery and acquitted of seven; Taylor was convicted of one and acquitted of one; Simkins was convicted of four and acquitted of one; and Smith was convicted of one.

Monroe was sentenced under the conspiracy count to imprisonment for twenty months to five years and to pay a fine of $1,000. He was also sentenced for sixteen months to four years for each bribery conviction, these sentences to run concurrently with one another and with his conspiracy sentence. Since the latter is for a longer time than his concurrent sentences for bribery, and since the conspiracy and bribery charges are intimately related, the judgment should be affirmed if no reversable error impairs the conspiracy conviction.[2] Since Prather was convicted only of conspiracy we are also required to review only that judgment as to him.

Monroe and Prather contend that there was a fatal variance between count one, the conspiracy count, and the proof, in that the conspiracy count charged but one conspiracy whereas the proof showed several. The same contention is made by all other appellants, but of course it is not available to them because they were acquitted of conspiracy. And insofar as Monroe and Prather are concerned we find no reversable error due to the alleged variance, assuming *arguendo* its existence. In *Berger* v. *United States*, 295 U.S. 78, 82, the Supreme Court held that the legal effect of such a variance depends upon whether it has substantially injured the defendant:

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[2] *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *United States* v. *Trenton Potteries*, 273 U.S. 392, 402; *Pierce* v. *United States*, 252 U.S. 239, 252-3; *cf. Bramblett* v. *United States*, — U.S. App. D.C., —, — F.2d —, *cert. denied*, — U.S. —. *Compare Nelms* v. *United States*, 94 U.S. App. D.C. 267, 215 F.2d 678; *Washington* v. *United States*, — U.S. App. D.C. —, — F.2d —.

> "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused."

The Court said that the reasons for the general rule requiring correspondence between allegations and proof are that the accused be definitely informed of the charges so as to enable him to present his defense without being taken by surprise by the evidence, and that he be protected against another prosecution for the same offense.

Applying these tests to the conspiracy convictions of Monroe and Prather it seems altogether clear their substantial rights were not affected. These two officers were the main participants in the undertaking to secure the bribery of Lt. Thoman. There was testimony that Monroe first approached Thoman about obtaining protection money from gamblers, and that Monroe brought Prather into the scheme with a view of both himself and Prather joining Thoman in carrying out a widespread plan of obtaining such money. After Monroe's initiation of the project, Prather, in accordance with Monroe's plan and at his instigation, personally spoke to Thoman about it. At an arranged meeting with Prather protection money was passed to Thoman. Thoman reported this to his superiors, and with them to the United States Attorney. There was abundant additional evidence of the conspiratoral activities of Monroe and Prather, including the passage to Thoman of names, addresses, and telephone and tag numbers of gamblers, and with contacts, in furtherance of the conspiracy, between Thoman and appellants Anderson, Simkins, Taylor, and King The conspiracy of Monroe and Prather embraced these others; and if any of the latter considered individually could not be said to have participated in as broad an operation as did Monroe and Prather, this did not significantly affect the fairness of the trial of these two for

conspiracy. They were a part in some way of all that occurred, though others might not have been. Therefore it cannot be said that proof of the whole operated unfairly to their prejudice, or came as a surprise to them. Furthermore, the possibility of prejudice in later defending on the ground of their present convictions, should they again be prosecuted for any of the count one transactions used to obtain these convictions, is too fanciful to be used as a basis for setting aside such convictions. The Supreme Court met a similar problem in *Berger* by stating, "certainly the fact that the proof disclosed two conspiracies instead of one, each within the words of the indictment, cannot prejudice his defense of former acquittal of the one or former conviction of the other, if he should again be prosecuted." 295 U.S. at 83. The reason this is so here, as well as in *Berger*, is that, assuming the indictment itself does not disclose all the conduct to which the evidence might be directed in proving the charge made, nevertheless, in event of an attempted second prosecution, resort could be had to the record of the evidence, or even to parole evidence if necessary. See *Dunbar* v. *United States*, 156 U.S. 185, 191; *Bartell* v. *United States*, 227 U.S. 427, 433; *Kotteakos v. United States*, 328 U.S. 750, 780 (dissenting opinion); *United States* v. *Busch*, 64 F.2d 27 (2d Cir.), *cert. denied*, 290 U.S. 627; 48 Harv. L. Rev. 515, 516.

Appellants' argument respecting the alleged variance relies heavily upon the opinion of Mr. Justice Rutledge for the Supreme Court in *Kotteakos* v. *United States*, *supra*, where substantial prejudice was found to have resulted from a conviction of a single conspiracy on evidence conceded by the government to have proved some eight or more different conspiracies. The indictment named thirty-two defendants of whom nineteen were tried. The cases of thirteen went to the jury and seven were found guilty. The key figure in that case, however,

the one common to the total scheme,[3] had pleaded guilty. He was not in the case as it was decided by the Supreme Court. The Court held that the variance was prejudicial. But the *Berger* case was not disapproved. It was distinguished on factual differences between the two cases. The *Kotteakos* opinion is a treatise upon the subject of when, and when not, error should lead to reversal within the terms of section 269 of the Jndicial Code, 40 Stat. 1181 (1919), 28 U.S.C. § 391 (1940), which requires an appellate court to give judgment "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." This principle is now embodied in Rules 51 and 52(a), Fed. R. Crim. P. But the finding by the Supreme Court of prejudicial error in *Kotteakos* cannot be transplanted to the case at bar. Not only in *Kotteakos* was the "hub" man out of the case when it reached the appellate courts, while here the two "hub" men are the only ones now involved in the question, but, as we have outlined, the scheme of Monroe and Prather extended to all that was proved respecting the conspiracy. They were not surprised, nor were their substantial rights otherwise prejudiced by the alleged variance.

Lt. Thoman equipped himself with a Minifon to aid in the investigation. Through this device numerous conversations he held with various appellants were recorded on wires. The spools upon which the recordings were made were turned over to Lt. Thoman's superiors in the Police Department. A number of recordings thus obtained were played for the jury over objections. We find no merit in any of these objections. Appellants contend, in the first place, that this evidence was inadmissible under the best evidence rule. They say that Lt. Thoman's testimony was the best evidence as to the conver-

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[3] The conspiracy charged was to obtain loans under the National Housing Act for purposes outside its terms.

sations. But courts have consistently admitted such recordings in evidence. *Schuyler* v. *United Air Lines*, 94 F. Supp. 472 (M.D. Pa.), *aff'd*, 188 F.2d 968 (3d Cir.); *Commonwealth* v. *Clark*, 123 Pa. Super. 277, 187 Atl. 237; *State* v. *Slater*, 36 Wash.2d 357, 218 P.2d 329; cases cited in Annot., 168 A.L.R. 927; *Burgman* v. *United States*, 88 U.S. App. D.C. 184, 188 F.2d 637, *cert. denied*, 342 U.S. 838; *Gillars v. United States*, 87 U.S. App. D.C. 16, 27, 182 F.2d 962, 973; *cf. People v. Hayes*, 21 Cal. App.2d 320, 71 P.2d 321. Their competency as evidence derives from their reliability as a means of arriving at the truth. Of course, there must be evidence introduced from which it can be inferred that the recordings are accurate. Lt. Thoman provided such evidence by testifying as to the operation of the recording device, his method of operating it, the accuracy of the recordings, and the identities of the persons speaking.

Appellants also argue that particular recordings, because inaudable at times or incomplete, gave the jury only a part of what they purported to represent. They cite *Hunter* v. *Hunter*, 169 Pa. Super. 498, 83 A.2d 401; *People* v. *Stephens*, 117 Cal.App.2d 653, 256 P.2d 1033; and *William v. State*, 39 Ala. 532. No all embracing rule on admissability should flow from partial inaudibility or incompleteless. The Court of Appeals for the Third Circuit, in *United States v. Schaerman*, 150 F.2d 941, 944, has said that partial inaudibility is no more valid reason for excluding recorded conversations than the failure of a personal witness to overhear all of a converation should exclude his testimony as to those parts he did hear. Unless the unintelligible portions are so substantial as to render the recording as a whole untrustworthy the recording is admissible, and the decision should be left to the sound discression of the trial judge. This is especially so when the witness who heard the statements recorded also testifies, so that the recordings give independent support to his testimony. *Wright* v.

State, —— Ala. ——, 79 So.2d 66; *State v. Slater, supra.* Here the trial judge followed the correct procedure of having the records played out of the presence of the jury so that she could rule on any objections raised by defendants before the jury heard the recordings. See *Wright* v. *State, supra* at 73. We have no basis for finding an abuse of discretion by the District Court in not deciding that the recordings were too incoherent, inaudible or partial to be admitted.

Appellants say the recordings were not admissible as corroborative of Thoman's primary evidence because the latter had not been impeached. They point to the rule that prior consistent statements of a witness are not admissible to corroborate his testimony until he has been impeached, citing *Goins* v. *United States*, 99 F.2d 147, 150 (4th Cir.). But we do not rest the admissability of the recordings upon a theory they constitute corroborative evidence, as is sometimes done. We think, as above indicated, that they are admissible as independent evidence of what occurred.

Various motions were filed for inspection of Government documents and recordings and to "play, hear, record, inspect and/or to copy" the recorded material. These motions were all denied. It is doubtful that the Minifon recordings could qualify for discovery and inspection under Rule 16, Fed. R. Crim. P., which applies to "* * * documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process * * *." The recordings are analogous to copies of confessions made by defendants to the police, which several courts have held do not fall within Rule 16. *Shores* v. *United States*, 174 F.2d 838 (8th Cir.); *United States* v. *Black*, 6 F.R.D. 270 (N.D. Ind.); *cf. United States* v. *Chandler*, 7 F.R.D. 365 (D. Mass.), *aff'd*, 171 F.2d 921 (1st Cir.), *cert. denied*, 336 U.S. 918. See, also, Comment, "Pre-Trial Disclosure in Criminal Cases," 60 Yale L.J. 626, 628. However, Rule 17(c), which also

permits the court to order pre-trial inspection, is broader in scope than Rule 16, extending to "books, papers, documents or other objects" designated in a subpoena, and since some subpoenas were served by defendants in the effort to obtain discovery we think their various motions and attempts should fairly be construed as invoking Rule 17(c). The recordings were evidentiary, and therefore under the interpretation of Rule 17(c) adopted by the Supreme Court and already followed by this court, the trial court in its discretion could have required pre-trial production. *Bowman Dairy Co.* v. *United States*, 341 U.S. 214; *Fryer* v. *United States*, 93 U.S. App. D.C. 34, 207 F.2d 134, *cert. denied*, 346 U.S. 885. However, the court did not abuse its discretion in denying appellants' requests, because the accused had already been accorded by the Government an opportunity to inspect the recordings. The United States offered to play them for the defendants and their counsel; and before the court denied the motions seeking specifically permission to inspect the recordings they had in fact been played over a period of three days in conformity with the Government's offer. Counsel for defendants in related cases attended the playing for part of the time. Appellants and their counsel could have done so.

Appellants argue that they were entitled to hear the original recordings, not the copies which the Government played. But the Government represented to the court that the original recordings were too fragile to be used for discovery playing and filed an affidavit in which the accuracy of the reproduction from the originals was certified. The truth of this affidavit is not brought in question. Consequently, it was well within the discretion of the trial court to decline to order inspection of the originals. And the argument now made that appellants were entitled to make stenographic transcripts of the recordings, or in lieu thereof to be furnished copies of transcripts made by the Government, was not pressed

upon the trial court in any of the motions for pre-trial discovery or production to which we have referred. Nor does it appear that permission was asked of the Government, and denied, to make a transcript at the time the recordings were played for the benefit of the defendants. Consequently, appellants cannot now complain that they were deprived of any alleged right to have a transcript.

It is contended that telephone conversations between Lt. Thoman and appellants were intercepted and recorded, and that the recordings were used in violation of section 605 of the Federal Communications Act, 48 Stat. 1103-4 (1934), 47 U.S.C. § 605 (1952). This provision reads in pertinent part as follows:

> "* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * * and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: * * *."

What occurred is that the Lieutenant obtained the telephone recordings now in question through the use of an induction coil apparatus, consisting of a suction cup attached to the telephone receiver, with a wire running from the cup to the Minifon recording device. We need not decide the much discussed question whether this constituted an interception within the meaning of the statute. See *United States* v. *Polakoff*, 112 F.2d 888 (2d Cir.), *cert. denied*, 311 U.S. 653; *Reitmeister* v. *Reitmeister*, 162 F.2d 691 (2d Cir.); *Flanders* v. *United States*, 222 F.2d 163 (6th Cir.); *United States* v. *Yee Ping Jong*, 26

F. Supp. 69 (W.D. Pa.); *United States* v. *Lewis*, 87 F. Supp. 970 (D.D.C.), *rev'd on other grounds sub nom. Billeci* v. *United States*, 87 U.S. App. D.C. 274, 184 F.2d 394; *United States* v. *Sullivan*, 116 F. Supp. 480 (D.D.C.), *aff'd*, 95 U.S. App. D.C. 78, 219 F.2d 760; *United States* v. *Stephenson*, 121 F. Supp. 274 (D.D.C.), *appeal dismissed*, — U.S. App. D.C. —, 223 F.2d 336; and our own case of *James* v. *United States*, 89 U.S. App. D.C. 201, 191 F.2d 472, *cert. denied*, 342 U.S. 948. All these decisions must be considered with *Goldman* v. *United States*, 316 U.S. 129. We do not reach the question because, assuming interception, no use of the recorded telephone conversation brought about reversible error in this trial. The recordings were not offered or admitted in evidence. The principal use made of them was by Lt. Thoman when, before giving his own testimony of the conversations recorded in this manner, he refreshed his recollection by playing the recordings. However, since he was himself the recipient of the messages, or a participant in the conversations, the connection between any possible violation of the statute and his testimony had "become so attenuated as to dissipate the taint" in its relation to admissibility. *Nardone* v. *United States*, 308 U.S. 338, 341. See, also, *Sullivan* v. *United States*, 95 U.S. App. D.C. 78, 219 F.2d 760. Lt. Thoman's testimony was not itself the product of an illegal interception; he repeated on the stand what he himself had heard. The aid the recordings gave to his recollection did not require the trial court to exclude his knowledge from the jury.

There is an additional contention that the so-called interceptions had been divulged to police officers and others in the Government's preparation for trial. But Lt. Thoman transmitted the same information legally, as the product of what he himself heard. See *Nardone* v. *United States*, *supra* at 341; *United States* v. *Goldstein*, 120 F.2d 485, 487 (2d Cir.), *aff'd*, 316 U.S. 114. Thus again it cannot be said that any part of the Government's

case was significantly produced by the allegedly illicit telephone interceptions.

The remaining point requiring discussion is the contention of appellants that the conviction of each must be reversed because each was prejudiced in his defense by the trial of all substantive charges together, and with the conspiracy charge. Except for the appellant Smith, however, no appellant reserved this point clearly on the record either before, during, or after trial. The motion of appellants before trial attacking the indictment itself for alleged misjoinder went to the validity of the indictment, not to the question of advisability of separate trials. Since the offenses charged were of the same or similar character, and the defendants were alleged to have participated in the same conspiracy, the joinder of offenses and defendants in the indictment itself was permissible under Rule 8, Fed. R. Crim. P., *Robinson* v. *United States*, 93 U.S. App. D.C. 347, 210 F.2d 29; *Scheve* v. *United States*, 87 U.S. App. D.C. 289, 184 F.2d 695; *cf. Spear* v. *United States*, 216 F.2d 185 (4th Cir.). Appellants also persistently contended that the proof showed more than one conspiracy, whereas only one was charged, and that this variance was prejudicial. We have disposed of that branch of the case in finding no prejudice caused Monroe and Prather by the alleged variance, and since the other appellants were acquitted of conspiracy any question in that regard is eliminated as to them. The present contention is based, not on a variance between indictment and proof, but on the trial at one time of the conspiracy count and the substantive counts of bribery. If appellants wished to be tried separately on these charges they were under strong obligation explicitly so to urge in the District Court by motion under Rule 14, Fed. R. Crim. P. See *Dunaway* v. *United States*, 92 U.S. App. D.C. 299, 205 F.2d 23; *United States* v. *Northeast Texas Chapter*, 181 F.2d 30 (5th Cir.). This was not done except in the case of Smith. The others

appear to have been willing to leave their fate to a trial including the conspiracy and substantive counts. Assuming, however, that the accused reserved the matter for our review, we find no error in the failure of the District Court to grant relief under Rule 14. We note initially that the problem is narrowed by the acquittal of all, except Monroe and Prather, of conspiracy. The gravest danger of prejudice was that some might be convicted of conspiracy through attribution to them of evidence applicable only to others. *Blumenthal* v. *United States*, 332 U.S. 539, 559. All except Monroe and Prather escaped this danger by their acquittal of conspiracy; and, as we have already seen, in connection with the discussion of the alleged variance, the evidence so clearly established that Monroe and Prather were intimately involved in the whole of what occurred, and the evidence of their participation in the conspiracy was so complete, that we cannot hold that prejudicial error afflicted their convictions of conspiracy due to the trial of others with them.

The validity of Monroe's conviction of conspiracy renders it unnecessary to consider his conviction of bribery, see note 2 *supra*, and Prather was acquitted of all substantive charges of bribery. Hence, the question remaining is whether the other appellants were prejudiced by being tried for conspiracy with the substantive offenses, and together on the substantive offenses, of which alone they were convicted. This involves a matter of judgment to be exercised now in light of developments at the trial, keeping in mind that the decision was for the sound discretion of the trial judge. *Dunaway* v. *United States*, *supra*. The jury, as we have seen, acquitted Prather entirely of bribery, Anderson was convicted of three of six charges of bribery, King was convicted of only one of eight charges of bribery, Taylor was convicted of one charge and acquitted of one, and

Simkins was convited of four and acquitted of one.[4] Thus, the jury was selective. This at least to some degree indicates that the jury returned verdicts only upon the basis of evidence relevant to each count and each defendant. *Finnegan* v. *United States,* 204 F.2d 105, 109-10 (8th Cir.). The judge specifically warned the jury in this regard, saying,

> "that with respect to the substantive counts of the indictment you must determine the guilt or innocence of each defendant charged thereunder solely on the evidence produced with respect to that defendant.
>
> * * *
>
> "Now, I shall not refer in detail to every one of the defendants, but that same rule applies to each and all of the defendants with respect to these substantive counts, and I have just mentioned this particularly so that it would be clear to you.
> "You are told that testimony which has been admitted only to apply as to a specified defendant may only be considered by you as to that defendant and none other."

Furthermore, the court charged in considerable detail as to the separate substantive counts. She referred to the dates and the amounts alleged to have been paid on those dates for protection, in such a manner that it is clear the jury understood just how they should go about determining guilt or innocence with respect to each substantive count. Judging the situation after the trial, therefore, as we must do, knowing that all appellants except Monroe and Prather were acquitted of conspiracy, and considering the evidence supporting each separate substantive count which resulted in a verdict of guilty, together with the court's full, fair and careful charge, we may not speculate that the trial actually led to any conviction which would not have occurred except for the

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[4] Smith was convicted of the single bribery charge which was brought against him.

consolidated trial. *Dunaway* v. *United States, supra.* While the danger of which the Supreme Court warned in *Blumenthal* v. *United States, supra* at 559, that evidence might be transferred to one to whom it does not apply, must be constantly in mind in permitting and in reviewing joint trials—a danger "likely to arise in any conspiracy trial and more likely to occur as the number of persons charged together increases"—we think the conclusion reached in *Blumenthal* that prejudice did not occur should also be reached here.

We have examined other contentions of appellants but do not find it necessary to discuss them. None requires reversal. They include the claim that the District Court abused its discretion in refusing appellants' request that Lt. Thoman be required to give a typewriting demonstration when being cross-examined about his testimony regarding his typewritten notes; the contention that evidence of other offenses than those on trial was erroneously admitted; and the contention that the court erred in refusing to instruct the jury on the subject of extortion.

Affirmed.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BURNIE KING, APPELLANT

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UNITED STATES OF AMERICA, APPELLEE

On Petitions for Rehearing

Filed June 12, 1956

Before WILBUR K. MILLER, FAHY, and DANAHER, Circuit Judges.

FAHY, *Circuit Judge:* In the opinion rendered April 30, 1956, we stated that appellants' argument that they were entitled to make stenographic transcripts of the recordings or to be furnished copies of the Government's transcripts was not pressed upon the trial court in the motions to which we referred. After issuance of our opinion appellants supplemented the record in this court by including a transcript of certain proceedings prior to trial which had not been before us when we decided the case. In those proceedings appellants did press for the right to make stenographic transcripts of the recordings or to be furnished copies of transcripts by the Government. Nevertheless, aside from appellants' failure earlier to bring this matter before us in the record on appeal, we conclude that the refusal to grant the request was not reversible error. In addition to the earlier opportunity, referred to in our opinion, to hear the recordings, those parts of the recordings actually admitted in evidence were played again out of the presence of the jury but with counsel for appellants present. This was done to aid the court in ruling upon their admissibility. This additional opportunity of appellants to acquaint themselves with the contents of the recordings actually used—during a trial which lasted some weeks—with no request or denial then of an opportunity to transcribe them, supports our conclusion that the refusal complained of was not such an abuse of discretion as to require a new trial of these cases. We add that appellants point to no particular prejudice which grew out of the refusal.

The petitions for rehearing are denied.

JUL 11 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 246

JOHN B. MONROE, GEORGE C. PRATHER, ROGER W. SIMKINS, CURTIS M. TAYLOR, CHARLES ANDERSON, BURNIE KING, *Petitioners,*

vs.

UNITED STATES OF AMERICA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

JOHN B. MONROE, GEORGE C. PRATHER, ROGER W. SIMKINS, CURTIS M. TAYLOR, CHARLES ANDERSON, BURNIE KING, *Petitioners,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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To the Honorable the Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

Petitioners, John B. Monroe, George C. Prather, Roger W. Simkins, Curtis M. Taylor, Charles Anderson and Burnie King, pray that a Writ of Certiorari issue to review the Judgement of the United States Court of Appeals for the District of Columbia Circuit, entered in the above case on April 30, 1956.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, printed in Appendix B, hereto, infra, p. 79, is not yet reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit denying the Petition for Rehearing is printed in Appendix C hereto, infra, p. 93, and is not yet reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on April 30, 1956. Rehearing was denied on June 12, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. (a) Whether a fatal variance affecting the substantial rights of appellants resulted by charging and trying them together on a single conspiracy count and at least eight conspiracies having separate, though similar objects, were made out by the evidence, if believed; and in which the participants in different schemes were, in the main, except for one, different persons, who did not have anything to do with one another.

(b) Whether petitioners were substantially prejudiced by being joined in the same indictment containing a conspiracy count and eighteen (18) substantive counts for trial together when it was neither alleged nor proven that they participated in the same acts or transactions, constituting an offense or offenses, and the joinder of their alleged distinct felonies were not provable by the same evidence and in no sense resulted from the same series of acts, especially where the court held that the basis for said joinder was the one count alleging a single conspiracy, where the evidence, if believed, made out eight (8) or more separate conspiracies.

2. (a) Whether the Court erred in denying petitioners' motions for discovery and inspection of wire recordings of conversations between the prosecution witness and various defendants pursuant to Rules 16 and 17 of the Federal Rules of Criminal Procedure.

(b) Whether it is a compliance with Rule 17 (c) of the Federal Rules of Criminal Procedure where there is an invitation by the prosecution to petitioners to be present

when the prosecution would play back alleged recordings of the original recordings in this and four other cases, but only under the following conditions: (1) that no stenographer could take notes of what was played, (2) that no recording device could be used to record what was being played, (3) that no court reporter could be present, (4) that no transcript would be furnished by the government, (5) that such play back would not be in the presence or under the supervision of a judge, and (6) such play-back would require three full days.

(c) Whether it was a violation of petitioners' rights under Rule 17 (c) of the Federal Rules of Criminal Procedure, and whether the trial court erred in denying petitioners' requests that he order the prosecution to permit petitioners (1) to take stenographic notes of the aforementioned recordings or (2) to make recordings of them or (3) to have a court reporter do so, under the circumstances contained in question 3(b) above.

3. Whether the Court erred in permitting in evidence proof of separate and distinct crimes other than those for which defendants were indicted and on trial, thereby denying the appellants a fair and impartial trial.

4. Was there a violation of the Federal Communications Act (Title 47, U. S. C., Sec. 605) where, over objection of petitioners, the prosecution witness (1) placed a device on his telephone and recorded telephone conversations with petitioners without the consent or knowledge of the petitioners and without a signal as to the use of said recorder; (2) played the recording to refresh his recollection as to his testimony at trial; (3) had transcripts made thereof and read the same to refresh his recollection at trial; and (4) had said recordings played to stenographers and police officers in preparation for trial and the trial court permitted the prosecution witness (a) to testify as to said conversations; and (b) to testify as to acts and conversations which were the sole result of said telephone calls and the Govern-

ment's own wrong? And did the Court err in refusing to rule that the "taps" were illegal and that the burden was on the Government to prove that the information so obtained did not lead, directly or indirectly, to the discovery of the evidence which it introduced?

5. Where evidence in a bribery trial tended to indicate that the alleged bribery payments were made because of extortion by the alleged bribee and other police officers upon the petitioners, and it was urged as a theory of defense, was it error for the trial court to deny petitioners' request that the jury be instructed that if the jury found extortion induced the payment of the money (the alleged bribe), it would constitute a defense to the charge of bribery?

6. Whether a defendant can legally stand convicted of bribery where the government contended and the court found and charged the jury that he was an aider and abettor of a co-defendant, who was the known principal, notwithstanding the acquittal of the said known principal and the court's instruction to the jury that if it acquitted the principal it must also acquit the alleged aider and abettor.

STATUTES AND RULES INVOLVED

The statutory provision and Rules involved are Title 18, Sec. 371, United States Code; Sec. 22-704, District of Columbia Code; Title 47, Sec. 605, United States Code; Rules 8(a), 8(b), 16 and 17(c), Federal Rules of Criminal Procedure. They are printed in Appendix A, infra, p. 77.

STATEMENT

The petitioners Monroe and Prather were convicted of conspiracy, Title 18, Section 371, United States Code. The petitioner Monroe was also convicted of three substantive counts of bribery in violation of Title 22, Section 704, District of Columbia Code (1951). Petitioner Anderson was convicted on three counts of bribery; the petitioner King was convicted on one count of bribery; petitioner Taylor

was convicted of one count of bribery; petitioner Simkins was convicted on four counts of bribery, and petitioner Smith was convicted on one count of bribery, all in violation of Title 22, Section 704, District of Columbia Code (1951).

Count one of the indictment herein charged that all the petitioners, together with one Winston, who was acquitted, conspired corruptly to influence Lieutenant Thoman, a local police officer, in enforcing gambling laws contrary to Title 18, Section 371, United States Code and Title 22, Section 704 of the District of Columbia Code (1951). Lt. Thoman was not named as a conspirator. The remaining 18 counts of the indictment charged the unlawful giving or receiving of bribes by the various petitioners.

Prior to the trial, the petitioners filed the following motions, all of which were overruled:

a. Motions to dismiss.

b. Motion to inspect the grand jury minutes.

c. Motion for bill of particulars.

d. Motion, pursuant to Rules 16 and 17, to hear, record, inspect and copy conversations had between the individual defendants and a police officer, which had been recorded on a wire recording device.

e. Motion for severance.

They were subsequently renewed at the beginning of the trial (Tr. 115), as well as at the close of the Government's case and at the close of the entire case. (Tr. 2415, 2631, 2633). These motions were overruled.

Notwithstanding the ruling of the Court on the petitioners' motion to hear the recordings of conversations between Lt. Thoman (the principal Government witness below) and the petitioners, the prosecution invited counsel for the petitioners to be present while it attempted a play-back of alleged recordings of the original recordings in this and four other cases, only under the conditions that no stenographer could take notes of what was played and no recording

device could be used to record what was being played. These alleged audition proceedings were not conducted in the presence of, or under the supervision of a judge, nor was a court reporter present. The prosecution further refused to give petitioners a transcript of the recordings. (This motion was later renewed before the trial judge, and overruled.)

Thereafter, counsel for petitioners appeared before the district judge and requested that he order the prosecution to permit the petitioners (1) to take stenographic notes of the recordings, or (2) to make recordings of them, or (3) to have a court reporter do so. It was explained to that judge that the recordings would require three full days to be played, that many of them were difficult to hear and understand, that the recordings allegedly were of many persons not involved in this case, but in four other cases, and that no lawyer could possibly *inspect* the recordings under such circumstances. The district judge refused all such requests.

The conspiracy count alleged that beginning sometime prior to October 29, 1953, and continuing thereafter until September 15, 1954, the petitioners conspired to bribe Thoman, a local police lieutenant.

The indictment also contained nineteen (19) substantive counts which charged a violation of Title 22, Section 704 of the District of Columbia Code (bribery). In those counts, the petitioners were either charged with giving Thoman a bribe, with giving Monroe a bribe, or Monroe was charged with accepting a bribe, all with the intent of influencing Thoman's or Monroe's actions as police officers.

Count two charged that on April 16, 1954, the petitioners Monroe, Prather and Anderson gave $500 to Thoman. Anderson was conveited on this count but Monroe and Prather were acquitted.

Count three alleged that on May 20, 1954, Monroe, Prather and Anderson gave $500 to Thoman. Anderson was convicted. Monroe and Prather were acquitted.

Count four alleged that on May 23, 1954, Anderson, Winston, Prather and King gave $1,000 to Thoman. Prather, Anderson and Winston were acquitted. King was convicted although the Court charged the jury that he was an aider and abettor of Winston in the delivery of the bribe to Thoman consistent with the theory of the prosecution and the evidence adduced. (Tr. 139, 714, 1936, 2638).

Count five alleged that on June 9, 1954, petitioners Simkins, Smith and Anderson gave $500 to Thoman. Simkins and Smith were convicted. Anderson was acquitted.

Count six alleged that on June 29, 1954, Winston and King gave $500 to Thoman. Winston and King were acquitted.

Count seven alleged that on July 3, 1954, Anderson, Monroe and Prather gave $500 to Thoman. Monroe and Prather were acquitted. Anderson was convicted.

Count eight alleged that on July 3, 1954, Simkins gave $500 to Thoman. He was convicted.

Count nine alleged that on July 7, 1954, Taylor and Winston gave $301 to Thoman as a bribe. Taylor was convicted. Winston was acquitted.

Count ten alleged that on July 9, 1954, Winston and King gave $100 to Monroe. Winston and King were acquitted.

However, count eleven charged Monroe with receiving a bribe of $100 from Winston and King on July 9, 1954. Monroe was convicted of receiving the money as a bribe while the petitioners who allegedly gave the money as a bribe were acquitted.

Count twelve alleged that on August 18, 1954, Winston and King gave $500 to Thoman. Both Winston and King were acquitted.

Count thirteen alleged that on August 19, 1954, Winston and King gave $100 as a bribe to Monroe. Both were acquitted.

Count fourteen alleged that on August 19, 1954, Monroe received the bribe alleged to have been given by Winston and King in count thirteen. Monroe was found guilty of

having received the money which King and Winston were acquitted of having given to him as set forth in count thirteen.

Count fifteen alleged that on August 19, 1954, Simkins gave $500 as a bribe to Thoman. Simkins was convicted.

Count sixteen alleged that on September 9, 1954, Winston and King gave $500 to Thoman. Both were acquitted.

Count seventeen alleged that on September 14, 1954, Winston and King gave $100 to Monroe. Both were acquitted.

Count eighteen alleged that on September 14, 1954, Monroe received as a bribe the $100 from Winston and King as alleged to have been given in count seventeen. Monroe was convicted notwithstanding the alleged bribers were acquitted.

Count nineteen alleged that on September 14, 1954, Simkins gave $500 to Thoman. He was convicted.

The petitioners were sentenced. The judgment of the Court was that they be imprisoned.

After the opening statement was made by the prosecutor outlining the Government's case (Tr. 119-162), motions for acquittal were made by all defense counsel on the grounds of:

1. A fatal variance existed because only one conspiracy was charged in the indictment and the opening statement indicated several conspiracies existed. (Tr. 162).
2. There was a misjoinder of offenses and defendants. (Tr. 166-169).

Appellant Smith moved for a severance because of the serious prejudice that would result to him in such a mass trial. (Tr. 188).

These motions were denied. (Tr. 166-190).

It was stipulated that the motion and objection of each petitioner applied to all petitioners. (Tr. 11, 17, 18, 210, 601, 816).

The evidence to establish guilt on both the conspiracy count and the substantive counts was commingled.

Petitioners feel constrained to set forth the evidence in some detail in order to demonstrate that a fatal variance affecting their substantial rights occurred because (1) one conspiracy only was charged and at least eight having separate, though similar objects, were made out by the evidence, if believed; and in which participants in different schemes were, in the main, except for one, different persons, who did not have anything to do with one another; and (2) petitioners were substantially prejudiced by being joined in the same indictment for trial together with many others, because it was neither alleged nor proven that they and the other defendants participated in the same acts or transactions, constituting an offense or offenses; and in the joinder in a single indictment and trial together of many defendants and many alleged felonies not provable by the same evidence and in no sense resulting from the same series of acts.

Lt. Thoman, the chief witness for the prosecution, testified that he was a lieutenant on the Metropolitan Police Force for the District of Columbia. Between October 28, 1953, and September 15, 1954, he was assigned as a lieutenant to the Gambling and Liquor Squad of that Department (Tr. 204). Monroe was the Captain and Commanding Officer of the 12th Police Precinct in the District of Columbia. Prather was a detective in the Police Department attached to No. 13 Police Precinct. (Tr. 206-207).

Evidence of Overt Act No. 1
Upon Conspiracy Count

On Thursday, October 29, 1953, Thoman met Monroe while they were both in attendance as witnesses at the United States District Court for the District of Columbia. There Monroe asked Thoman if he was getting any money from gamblers. (Tr. 208). Thoman said he was not, but was interested. (Tr. 1553). Over objection, he testified that Monroe informed him that he was sorry that he (Monroe) did not get any money while attached to the Gambling and

Liquor Squad, (Tr. 212), but that if Thoman was interested a certain gambler would give him $200 per month. (Tr. 1553). Monroe also told Thoman that he would have Prather get in touch with him because Prather could get Thoman in touch with that gambler's boss. (Tr. 212).

Monroe said to Thoman that no chances would be taken because Prather would bring Monroe the money. (Tr. 1553).

On October 30, 1953, Prather met Thoman. (Tr. 213). On October 31, 1953, Prather telephoned Thoman. Before that conversation was admitted, the Court denied the petitioner's request to ascertain whether the telephone conversation had been intercepted illegally. (Tr. 217). During that phone conversation Prather asked the witness to meet him at Bladensburg, Maryland, at 2:30 p.m., that day. (Tr. 217, 1912). They did so meet. At this meeting Thoman got $400 from Prather. (Tr. 1912-1913).

Between Thursday, October 29, 1954, and Monday, November 2, 1954, Thoman thought over whether he would enter into the scheme or should report the matter or forget it. (Tr. 1911, 2023, 2024). Finally, on November 2, 1954, he made up his mind and reported his conversations with Monroe and Prather to Deputy Chief Lutz of the Police Department. (Tr. 1559). Lutz immediately consulted with Chief Murray. Shortly thereafter all the officers conferred with the United States Attorney Rover and Assistant Gasch. (Tr. 219).

Evidence of Overt Act No. 2 Upon Conspiracy Count

On November 17, 1953, Thoman received a telephone call from Monroe and, although defense counsel objected, the Court refused to permit him to state the grounds of his objection. (Tr. 222). As a result of the telephone call, Monroe met Thoman and delivered to him a match pad (Exhibit 1A), which Monroe said Prather had sent. (Tr. 223). A paper (Exhibit 1A) was enclosed in the match pad on which

was written the names, addresses, auto tag numbers and telephone numbers which the witness identified as gamblers and gambling establishments. (Tr. 225-231).

A motion for mistrial was made because the names and addresses appearing thereon were not material to the instant case, but were part of another alleged conspiracy case involving Monroe and Prather. The motion was denied. (Tr. 231-240).

Evidence of Overt Act No. 3
Upon Conspiracy Count

On November 24, 1953, Thoman met Prather, who asked him if he had received the list that he had sent over by Captain Monroe on November 17, 1954. At that time, Prather advised Thoman that the "x's" appearing on Exhibit 1A were large "turn in spots" of a number operator (Pat Hogland) not connected with this case but indicted with Monroe and Prather for conspiracy in another case (Cr. No. 980-54, United States District Court for the District of Columbia). (Tr. 231-233). Over objection, Exhibit 1A was received in evidence. (Tr. 238).

None of the individuals set forth on Exhibit 1A or the places identified thereon were involved in the proceedings below. (Tr. 238-241, 1915). However, as a result of arrangements made between Prather and Thoman on October 31, 1953, the places of Beach and Pat Hogland, appearing on the list, were to be given police protection by Thoman for money brought to him by Prather. (Tr. 1916).

A portable magnetic wire recording device operated by batteries and identified as a Minifon (Exhibit 3) was used by Lt. Thoman, the principal Government witness, to record conversations had between him and the various defendants. These recordings as made on spools of magnetic wire (Exhibits 2, 6, 9, 11, 13, 14, 19, 21 and 23) were introduced in evidence over objection and played to the jury.

Objection was based upon the following grounds:

1. It violated the best evidence rule.
2. It was improper corroboration of direct testimony.
3. It was an invasion of privacy and unethical.
4. The Minifon had not been tested prior to its use.
5. The recordings were unintelligible and inaudible.
6. The instrument was incapable of being cross-examined. (Tr. 329-347, 467-472, 807-814).
7. The witness had a distinct personal recollection of many of the conversations and, therefore, in those situations the recordings were inadmissible in any event. (Tr. 461, 766, 908).
8. The witness had made or caused to be made stenographic transcripts of the entire recording and, therefore, he could recall the conversations verbatim. (Tr. 665).
9. The petitioners were denied the right to listen to the entire recordings contained on the various exhibits, (Tr. 474, 482, 664) because the Government represented that such undisclosed portions of the recordings were immaterial. (Tr. 809, 913).
10. Some of the conversation on the recordings constituted a violation of the Communications Act. (Tr. 664, 766).
11. The recordings as heard by the jury contained evidence of separate and distinct offenses other than those charged in the indictment. (Tr. 811).
12. As to Exhibit 13, the entire conversation was not recorded. The supply of recording wire became exhausted before the conversation concluded. (Tr. 909, 910, 912, 913).
13. Its use violated the constitutional provision that a witness must confront the accused. (Tr. 958).

At no time were any of the petitioners advised that Thoman was equipped with the Minifon device nor was their consent obtained to record their conversations. (Tr. 740).

Recordings of various telephone conversations between Lt. Thoman and the petitioners, as hereinafter indicated,

was had by attaching a recording device (Exhibit 3) to the outside of the telephone receiver, a suction cup with a wire attachment (Exhibit 8) leading to a Minifon recording device (Exhibit 3). The latter recorded the conversations.

The Government stipulated that in all telephone conversations with any of the petitioners, no permission was obtained from any of them to record such conversations and that Thoman did not seek or get their permission to play any of the recordings made and that no signal was given that he was using recording equipment. (Tr. 973).

On January 15, 1954, Prather phoned Thoman. The Court refused to permit petitioners to ascertain if that conversation was monitored. (Tr. 241). Prather inquired if any warrants had been issued for a place located on 11th Street. Thoman stated he would investigate and let Prather know. He did so and advised Prather that such a warrant had not been issued. (Tr. 242).

On January 25, 1954, Thoman received a telephone call from Prather at 7:30 a.m. As a result of that telephone conversation, Thoman stated that approximately an hour later he met Prather in the vicinity of Police Headquarters and there Prather gave him $200. He testified that Prather at that time also stated to him that one of the gamblers paying $200 a month to Thoman had laid off some of his work with the Simkins outfit. (Tr. 248).

On April 6, 1954, Thoman met Prather at 4th and Florida Avenue, N.E., Washington D.C., at 9:00 p.m. (Tr. 250). At that time, Thoman was equipped with the Minifon recording device (Exhibit 3) containing a spool of recording wire (Exhibit 2) which purportedly recorded the conversation that took place between them.

At this meeting, Prather stated that he knew a Charles Anderson who wished to pay Thoman $500 per month as protection for his number lottery. (Tr. 251, 312). On cross-examination Thoman testified to the contrary. (Tr. 1929). Thoman said he would be interested in getting $500 per month. (Tr. 254). Within a day thereafter, Thoman again

prepared notes of his conversation with Prather on a typewriter which he kept at home. He refreshed his recollection from these notes and stated that Prather informed him that he would make arrangements for Anderson, who was in the number business, (Tr. 256), to meet Thoman. (Tr. 253). However, it was Thoman who first mentioned Anderson's name. (Tr. 321, 1661). In fact, it was Thoman who said to Prather, "We have got to get hold of Anderson." (Tr. 1929). The recording of the conversation between Prather and Thoman of April 6, 1954, was then offered in evidence (Exhibit 2). A preliminary cross-examination of the witness was permitted by the Court below. He testified that he had a distinct personal recollection of that conversation. (Tr. 283).

Exhibit 2 was then played outside of the presence of the jury for the benefit of all petitioners and their counsel. (Tr. 307-326). The trial Court permitted all counsel and all petitioners to hear so much of the conversation recorded on the Minifon wire as the Government offered in evidence prior to the playing of such recordings to the jury.

The admission of Exhibit 2 was objected to on the grounds hereinbefore set forth.

However, the Court admitted it (Tr. 370) and permitted the record to be played to the jury. (Tr. 373-392). Amplifiers were used. (Tr. 359, 369).

Evidence of Overt Act No. 4
Upon Conspiracy Count

On April 13, 1954, Thoman received a telephone call from Prather. The petitioners objected to the admission of that conversation on the ground of violation of the Communications Act. (Tr. 394). Their objection was overruled. (Tr. 395). In that conversation an appointment was made to meet Prather on April 14, 1954. (Tr. 411).

On April 14, 1954, Prather again met Thoman and advised him that arrangements had been made for Thoman

to meet Charles Anderson, and that he would phone later in the week. (Tr. 412).

Evidence of Overt Act No. 5 Upon Conspiracy Count and Evidence to Sustain Substantive Count No. 2

On April 16, 1954, Prather phoned Thoman. Petitioners requested that it be ascertained whether such conversation was intercepted. (Tr. 413). That was denied. Prather told Thoman that arrangements had been made to meet Anderson at 8:30 that night at Bladensburg Road and Eastern Avenue, N.E., Washington, D.C. (Tr. 414). They met (Tr. 415), and Prather spoke to Thoman for a minute and introduced Anderson to him. (Tr. 420). Prather left to make a phone call. Anderson and Thoman remained in Prather's car.

Anderson and Thoman conversed for 20 to 30 minutes. (Tr. 421). Anderson told Thoman that he was an independent operator. (Tr. 1941). Thoman said to Anderson: "Well, Prather said that you had offered $500. That is what he told me." Anderson denied this was so and said to Thoman:

> "Now that is pretty stupid. As small as I am. That is too much for me . . ." (Tr. 444).

No conversation was had between Thoman and Anderson at any time when any of the petitioners were present. (Tr. 1943). Thoman also said that he tried to keep the various transactions between him and the various petitioners separate and distinct. (Tr. 1943). He did not discuss with Anderson any of his transactions with the other petitioners. (Tr. 1943, 1966-1967). Anderson told Thoman that he wanted a guarantee on his office and drops. (Tr. 422). He testified that Anderson informed him that Jake, Mac and Eddie were in business with him; Simkins was the backbone from whom Anderson could get money but that he was independent of Simkins. (Tr. 422). Thoman said he informed Anderson that Prather had advised him (Thoman) that

Anderson would pay $500 a month. Anderson gave Thoman $500 (Exhibit 5). (Tr. 423). During this conversation, Thoman was equipped with a Minifon, freshly furnished with a spool of wire (Exhibit 6). (Tr. 428). Thoman's recollection of the conversation of April 16 was distinct. (Tr. 435). The conversation of April 16 as recorded was then played outside the presence of the jury to all the parties and their counsel. (Tr. 441-448).

Objections to Exhibit 6 on the grounds previously stated (Tr. 461, 479) were made and overruled and the recordings as deleted were played to the jury. (Tr. 489-494).

Thoman testified that the bribe given to him by Anderson on April 16, 1954, was not to influence his action as a police officer on behalf of Smith, Simkins, King, Winston or Taylor, but was money paid by Anderson to protect him alone. In fact, at that time, Thoman did not know Smith, Simkins or Taylor. (Tr. 1700-1702). Upon the advice of his superiors, he did not arrest Anderson. (Tr. 1708). Furthermore, Deputy Chief Lutz, Captain Layton and the principal Assistant United States Attorney told him not to raid Anderson's place of business. (Tr. 1711-1712).

We invite the Court's attention to the fact that neither Winston, King, Taylor, Simkins nor Smith were any part of this transaction.

On April 18, 1954, Thoman phoned Anderson at his home and inquired of him if he had contacted Winston, King and the Sutters. (Tr. 498). Anderson replied that he had and that they were willing to pay Thoman protection money. (Tr. 501).

Evidence of Overt Act No. 6 Upon Conspiracy Count and Evidence to Sustain Substantive Count No. 3

On May 20, 1954, Thoman again phoned Anderson at his home. (Tr. 502). As a result, they met at Bladensburg Road and Eastern Avenue, N.E., Washington, D.C. (Tr. 504). Thoman advised Anderson that he (Thoman) had heard

that Simkins threatened number operators that they must get right with him. (Tr. 506). Anderson replied that a lot of small operators were turning their work in to Simkins. (Tr. 507). At that time, Anderson gave Thoman $500 (Exhibit 7). (Tr. 508, 516, 546).

Thoman testified that the $500 given to him by Anderson on May 20, 1954, was not to protect Smith, Simkins or Taylor. In fact, it was only to protect Anderson, (Tr. 1719-1721), identified by Thoman as the only gambler at that time involved. (Tr. 1721).

During this conversation of May 20, 1954, Thoman was equipped with the Minifon device, newly loaded with a wire recording spool. (Tr. 519).

The defense at this time offered to prove by the official trial court reporters that much of what they attempted stenographically to record of the conversations contained on Exhibits 2 and 6 were inaudible and unintelligible. This offer was refused by the Court. (Tr. 525, 530, 533).

Evidence of Overt Act No. 7
Upon Conspiracy Count

The witness Thoman was asked on direct about a telephone conversation with Anderson on May 21, 1954. (Tr. 548). That was objected to because of violation of the Communications Act. (Tr. 549). The petitioners were not permitted to examine Thoman to determine whether that message was intercepted or monitored. (Tr. 549). Thoman then stated that his notes and "a recording of the telephone conversation" had refreshed his recollection. (Tr. 550). Thoman stated that Anderson told him that the latter had made arrangements for Thoman to meet Winston. (Tr. 551). Again the Communications Act was invoked against the introduction of such evidence. Nevertheless, the conversation was admitted. (Tr. 552). Anderson met Thoman, but Winston did not. (Tr. 562).

Evidence of Overt Act No. 8
Upon Conspiracy Count

On May 22, 1954, at about 7:00 p.m., Thoman phoned Anderson at his home. (Tr. 568). This telephone conversation was also monitored and recorded by Thoman. (Tr. 570).

Objection was made to the admissability of the conversation on the ground of violation of Title 47, Section 605, United States Code. (Tr. 570). Thereupon, Thoman testified that he attached a suction cup to the end of the telephone receiver where the sound is heard (the end opposite to that into which words are spoken). (Tr. 571, 572). The cup was attached to a wire, the other end of which was inserted in the recorder. (Tr. 575). The recording was made by operation of batteries in the instrument. (Tr. 575).

The Court refused to hear any argument of law on the admissibility of the conversation as evidence and overruled objection to it. (Tr. 575).

In that conversation, arrangement was made for Thoman to meet Winston at 10:00 p.m., May 22, 1954. (Tr. 576).

Anderson, Winston and Thoman met at the appointed place on May 22 at 10:00 p.m. (Tr. 580). Anderson immediately departed. Thoman and Winston then had a conversation in which Winston asked Thoman for protection for Winston's number business. Thoman asked Winston if he had thought of the price. Winston replied he had not but he would take the matter up with King and let him know. (Tr. 585). This conversation was recorded on Minifon wire (Exhibit 9), which contained the conversations of May 20 and the 7:00 p.m. conversation of May 22, 1954. (Tr. 588). They were admitted in evidence. (Tr. 611).

Although other conversations, the nature and scope of which were unknown to the defense, were recorded on Exhibit 9, the Court permitted only the conversations of May 20 and May 22, 1954, to be heard by the parties, the Court and counsel. (Tr. 622). Counsel for the defense thereupon asked permission to hear all of the recordings on Exhibit 9 in order properly to represent their clients. (Tr. 625). The

Court declined to permit such an audition. (Tr. 625, 627). She advised counsel that only so much of the conversations contained on Exhibit 9 which the Government offered in evidence could be heard by the defense.

Exhibit 9 contained approximately five minutes of conversations which was not revealed to the Court, counsel or petitioners. (Tr. 625). We must assume that the prosecutor knew the undisclosed conversation on Exhibit 9 because they had been furnished with stenographic transcripts of its contents. (Tr. 771, 772). Further, they must have listened to it in order to introduce in evidence that which they wished. (Tr. 635).

The recordings as played for the petitioners, the Court and Counsel, but not the jury, as contained on Exhibit 9, are set forth in the record on Pages 639-646.

The witness Thoman then spun the wire recording contained in the Minifon (Exhibit 9) for a period of three minutes. No one except the witness and the prosecutor knew what conversations were on that recording. (Tr. 647). The witness' statement that the matter contained on Exhibit 9 and heard by him alone had nothing to do with the conversations between him and Winston and between him and Anderson was taken as final. (Tr. 647). The recordings of the alleged whole of the conversation between Thoman and Anderson at 12:40 a.m. on May 22, 1954, was then auditioned for all of the parties, the Court and counsel but out of the presence of the jury. (Tr. 648-652). Then for a period of three minutes, Thoman played the wire recording privately to himself until he said he reached the recording of the conversation of May 22, 1954, at 10:00 p.m., among Anderson, Winston and Thoman. (Tr. 652-653). The witness stated that the three-minute conversation which was not auditioned for anyone was a telephone conversation. (Tr. 653).

After so much of the recording was played as the prosecutor and the witness deemed pertinent, the substance of which neither the Court, the petitioners nor their counsel knew, the abridged recording as played to the Court, coun-

sel and petitioners was offered in evidence. The defense again objected.

Government Exhibit 9 was admitted in evidence and auditioned for the jury with the same deletions that occurred when they were played to the parties, counsel and the Court. (Tr. 671-695.) Motion to strike the recorded testimony was made and overruled. (Tr. 696).

Evidence of Overt Act No. 9 Upon Conspiracy Count and Evidence to Sustain Substantive Count No. 4

On May 23, 1954, Thoman called Anderson on the telephone. (Tr. 697). That conversation was intercepted by Thoman. (Tr. 698). A recording of it was played to the witness, Captain Layton and Mrs. Boots, the stenographer at Police Headquarters. (Tr. 699). Thoman again stated that his testimony respecting that conversation was on the basis of his recollection "and also listening to the recording." (Tr. 700). Thoman testified that the recording had been reduced to writing and that he had read such writing "over the week-end and read them this morning." The notes that Thoman so read were "both my notes and the transcript of the recording." (Tr. 702). The witness repeated that statement a second time. (Tr. 705). The witness also stated that sometimes he played the recording before he made his own notes respecting the telephone conversation and that sometimes he made his notes before he played the recording. He could not say what he had done in this case. (Tr. 707). As a matter of fact, the witness could not say whether he had played the recording before or after he had made his notes of any particular telephone conversation. (Tr. 708).

At the time of this conversation, the suction cup, Government Exhibit No. 8, was attached to the telephone and plugged into the recorder, Government Exhibit No. 3. Thereafter, Thoman turned on or put the power into Government Exhibit 3 and started the batteries working to record what he heard. (Tr. 709). That attachment would not have re-

corded any message if the electricity was turned off. (Tr. 711).

The witness was permitted to answer that Anderson arranged for King and Wilson to meet Thoman at 10:00 p.m., May 23, 1954, (Tr. 711). At that time, at Bladensburg Road and Eastern Avenue, N.E., King told Winston to give Thoman $1,000 which Winston did (Tr. 714). (Exhibit 10), in order to take care of the matter previously discussed between Thoman and Winston which was to give police protection to their drops and counting houses. Exhibit 10 ($1,000) was offered in evidence. (Tr. 718). The conversation among Thoman, Winston and King on May 23 was recorded by the Minifon device. The spool of recording wire contained therein was new and unused. (Tr. 727.) However, a conversation of two or three minutes was contained on the wire which Thoman stated occurred prior to the time the conversation among Winston, King and Thoman occurred. (Tr. 730).

The $1,000 received on May 23, 1954, by Thoman from Winston was not to give police protection to Smith, Simkins, Taylor or Anderson. (Tr. 1754).

On June 1, 1954 (Tr. 732), Thoman received a telephone call from Prather. (Tr. 733). Thoman was at his home in Maryland. The recording device was connected to the telephone and the conversation was recorded. (Tr. 735). It was stipulated that Thoman did not inform Prather that the recorder was in operation (Tr. 740) and that Prather did not consent to its use. (Tr. 741).

That stipulation was made as to all the other telephone conversations theretofore offered in evidence. It was further stipulated that permission was never sought for any recording or for the playing of any recording and that no signal as to the use of a recorder was given. (Tr. 973, 743).

In the conversation of June 1 arrangements were made for Prather and Thoman to meet at the Hot Shoppe at 4th and Florida Avenue, N.E. (Tr. 755).

Again objection was made that anything that developed

or grew out of a telephone conversation unlawfully monitored in violation of the Communications Act could not be used in evidence. (Tr. 739-753). However, Thoman was permitted to testify that Prather informed him that Simkins told Prather to see a party identified as "Catfish" who was an employee of Simkins and working for him in the 13th Police Precinct as a number pickup man. (Tr. 757). Motion for a mistrial because of proof of a separate and distinct offense in no manner connected with the charge of the indictment was made and overruled. (Tr. 558). On this occasion, Thoman said that Prather also inquired of him if he had gotten straight with Simkins. (Tr. 758). This conversation was also recorded on the Minifon and on the same spool of recording wire (Exhibit 11) with the conversation of Winston, King and Thoman of May 23, 1954. Over objection it was received in evidence. (Tr. 554, 821).

The recording of May 23, 1954 (Exhibit 11) was then played to the jury. (Tr. 821-831).

After its completion, motions for mistrial were made and overruled based upon the introduction of evidence of a separate and distinct offense. (Tr. 831).

The recorded conversation between Prather and Thoman on June 1, 1954 (Exhibit 11) was then played to the jury. (Tr. 832-844).

On June 3, 1954, Thoman received a telephone call from King. (Tr. 847). That conversation was intercepted in the same manner as theretofore. (Tr. 848). The recording was played before Captain Layton and Mrs. Boots and a typewritten transcription of it was made. (Tr. 851). The witness played the recording about three weeks prior to the date of this testimony. (Tr. 853). The witness read the transcription of the conversation the night before his testimony. (Tr. 854). That was done for the purpose of refreshing his recollection. (Tr. 855). In that conversation, King said he would call him back in 15 minutes. (Tr. 858).

King called Thoman back about 6:45 p.m. on June 3, 1954.

(Tr. 859). That telephone conversation was had under the same circumstances as the prior call. (Tr. 859-860).

The witness stated that his answers would have been the same with respect to the manner in which he made the recordings of the second conversation and the playing back of the record. (Tr. 860).

Over the objection of the petitioners, Thoman testified that King told him about Kings' numbers office and drops; that Thoman asked King about King locating in No. 12 Precinct, (Tr. 861); that Thoman told King that Thoman could take care of King in No. 12. (Tr. 862).

Evidence of Overt Act No. 10
Upon Conspiracy Count

On June 3, 1954, at 7:20 p.m., Thoman received a telephone call from Anderson. (Tr. 862). The witness stated that if asked the same questions respecting the recording of the conversation, as heretofore asked, his answers would be the same. (Tr. 863-864). Anderson said that he had heard of the arrest of Taylor and that Taylor had talked about him. Anderson said he and other number operators were worried. (Tr. 865).

Evidence of Overt Act No. 11
Upon Conspiracy Count

On June 3, 1954, at 10:15 p.m., Thoman called Monroe on the telephone. (Tr. 865). Thoman testified that if asked the same questions respecting the recording of that conversation, his answers would be the same as heretofore. Thoman was in Maryland. Monroe was in the District of Columbia. Over objections of the petitioners, Thoman testified that he asked if Monroe knew King. (Tr. 866). Monroe said he did. Thoman asked Monroe if King and Winston could move into No. 12 Precinct if they paid him $200 per month. Monroe agreed to that. (Tr. 867).

On June 4, 1954, Monroe called Thoman. Thoman testified

that if asked the same questions respecting the monitoring of that call as asked about prior calls, his answers would be the same. (Tr. 868).

Over the objection of the petitioners, the witness was allowed to testify that he told Monroe that he had not heard anything yet. (Tr. 869).

On June 7, 1954, Thoman received a telephone call from Winston. (Tr. 874). Thoman testified that if asked the same questions with regard to the alleged interception as he was asked on previous telephone calls, his answers would be the same. (Tr. 875). The witness was allowed to testify that Winston had an office established in the Rhode Island Avenue Plaza. (Tr. 876).

Evidence of Overt Act No. 12 Upon Conspiracy Count

On June 9, 1954, Thoman received a telephone call from Anderson. (Tr. 878). Thoman said his answers would be the same as those respecting previous telephone conversations. Over the same objection, Thoman testified that Simkins wanted to see Thoman; that Simkins was having trouble with people running his numbers business and that Simkins wanted to put his wife in the office. (Tr. 879).

As a result of the recorded telephone conversation (Tr. 2069), Thoman testified that he met Simkins at Bladensburg Road and Eastern Avenue, N.E., at 9:30 p.m. (Tr. 883). This was the first time Thoman had ever seen Simkins. (Tr. 2068). Over objection that the meeting and conversations of Simkins and Smith with Thoman grew out of and was the fruit of an unlawfully recorded telephone conversation, (Tr. 901), Thoman testified that he got into Simkin's car and took a ride with him into nearby Maryland. During this journey, Simkins told Thoman he was having trouble with people running his number business and he wished to put his wife in his office and wanted to pay Thoman $500 a month for protection. (Tr. 885). After the journey partly into Maryland (¾ of a mile) (Tr. 2071), Simkins and Thoman

came back to the District of Columbia and picked up Smith about a block from the original meeting between Thoman and Simkins (Tr. 886).

Evidence of Overt Acts Nos. 13 and 14 Upon Conspiracy Count and Evidence to Sustain Substantive Count No. 5

Thoman, after refreshing his recollection from his notes (Tr. 882), testified that Smith said he and Simkins were partners in the number business (Tr. 887); and that their office was located at 408 M Street, N.W., and that Smith also stated that he knew that Thoman was in a position to give protection and that is why they were offering $500 a month. (Tr. 887). Thoman testified that he, Simkins and Smith continued to drive in Simkins' car and that Simkins stopped the car momentarily (Tr. 887), or for a second (Tr. 902), and that Simkins paid him $500 (Tr. 887). The $500 paid by Simkins to Thoman was not to give police protection to Taylor, King, Winston or Anderson. (Tr. 1761).

The conversation between Thoman and Simkins as well as the conversation among Simkins, Smith and Thoman during the journey was recorded on the Minifon device, (Tr. 902), which had been loaded with a spool of wire (Exhibit 13) on June 6 or June 7). (Tr. 903). Conversations prior to the conversation of June 9 were also recorded on the spool (Exhibit 13). (Tr. 906). Objection was made to the admission of Exhibit 13 based on the 13 grounds heretofore urged.

The deleted recording was then played before all parties, counsel and the Court but outside the presence of the jury. (Tr. 915, 926). Exhibit 13 was admitted and played to the jury. (Tr. 941-950).

After Exhibit 13 had been auditioned to the jury, counsel proffered the testimony of the court reporter that the recordings were inaudible and unintelligible to him, which proffer was denied. (Tr. 953-954).

On June 10, 1954, Thoman received a telephone call from

Winston. (Tr. 959). Thoman had the recording machine attached to the telephone. (Tr. 961, 962, 963, 964). Thoman played back the recording either before or after he made notes respecting the conversation. (Tr. 965). A typewritten transcription of the recording was made, (Tr. 966), which Thoman read the day before testifying. (Tr. 966-967).

Over objection, (Tr. 959), Thoman testified that Winston asked if Thoman knew T. and J. were out around Sim's house and whether they were working on anything out there. Thoman said he did not know. Winston also asked if the police had a case against Taylor and Thoman said he did not think they had enough evidence. (Tr. 975).

On June 11, 1954, Thoman called Simkins on the telephone. Thoman said his testimony as to recording the conversation would be the same as heretofore. (Tr. 975). Over objection (Tr. 975), Thoman was permitted to testify that he told Simkins he had received a complaint about Simkins' office at 408 M Street. Simkins said "Okay, thanks. We will be gone tomorrow." (Tr. 980).

Evidence of Overt Act No. 15
Upon Conspiracy Count

In a phone call of June 20, 1954, from Simkins to Thoman, Thoman was asked to meet Simkins on June 21, 1954. (Tr. 981). They met at Bladensburg Road and Eastern Avenue, N. E. Smith was present. (Tr. 982).

Thoman also stated that Simkins spoke about one time at 11th and O Streets Northwest, when Simkins took a pistol away from a pimp and beat him up. Counsel for defendants moved the Court to withdraw a juror and continue the case because of proof of a separate and distinct offense. That motion was denied and all that the Court said to the Jury was:

> The jury will disregard the statement as being a statement of any offense, the statement that the witness has just made concerning what Simkins said to him. (Tr. 984).

After refreshing his recollection from notes (Tr. 986), Thoman testified that both Simkins and Smith advised Thoman of the address of their new number office at 1342 Oates Street, N. E. (Tr. 986).

On June 22, 1954, Thoman called Anderson on the telephone. (Tr. 993-994). Thoman stated that his answers as to questions previously put to him about his method used in telephone conversations would be the same in this instance. He was permitted to state that he asked Anderson to meet him that night but Anderson said no—make it the latter part of the week. Anderson said he had moved to 1623 Oates Street, N. W., but that he was going back to his other office. (Tr. 995).

On June 23, 1954, Winston telephoned Thoman. (Tr. 997-998). Thoman said that if the same questions were asked him about the telephone call as those asked about other monitored or recorded telephone conversations, his answers would be the same. Over the objection of petitioners, the witness testified that he and Winston agreed to meet at Bladensburg Road and Eastern Avenue. (Tr. 999). Winston said Officers Carter, Stone and Johnson had been following some of his people and that he would meet Thoman. (Tr. 1000).

After that conversation, Winston and Thoman met at the appointed place and Thoman asked Winston to give him $100 per month for Monroe in order for Winston to operate his number business in No. 12 Precinct. (Tr. 1003). At that time, Monroe did not know Winston. (Tr. 1773).

This conversation was recorded on the Minifon recording wire introduced in evidence as Exhibit 14, which also contained recordings of conversations alleged by the prosecution to be immaterial. Counsel for the petitioners were denied the right to hear such recordings except as deemed material by the prosecution. Further, the identity of the parties whose voices were recorded could not be ascertained. (Tr. 1011-1012).

Ten minutes of the recording contained on Exhibit 14 was

listened to with ear phones by the witness alone. The request of counsel to hear that which was played was denied by the Court upon the representation by the prosecution that the recordings were not material to the matter on trial. (Tr. 1028). Over objection, Exhibit 14 which contained the conversation between Winston and Thoman was admitted in evidence. (Tr. 1048-1057-1081).

Evidence of Overt Act No. 16 Upon Conspiracy Count and Evidence to Sustain Substantive Count No. 6

One June 29, 1954, Thoman called King. (Tr. 1063-1064). Thoman had a recording device attached to the phone. He was in Maryland. King was in the District of Columbia. (Tr. 1066). Thoman played it back; then made notes. (Tr. 1067). The Court refused to permit the witness to say whether a transcript had been made of the recording. (Tr. 1067-1068). Thoman used the Minifon attachment to record the conversation. (Tr. 1068). Over objection, Thoman stated he made an appointment to meet King that night at 9:30. (Tr. 1072).

Thoman met Winston that night as a result of the call (Tr. 1072) when Winston gave Thoman $500. (Tr. 1077).

For this sum of money, no police protection was given to Smith, (Tr. 1782), or Simkins, (Tr. 1783), or Anderson, (Tr. 1784).

In the same conversation, Winston asked Thoman if he wanted to meet the defendant Taylor so that the latter would take over paying part of the protection money to Thoman. (Tr. 1077). Prior to July 1, 1954, Thoman was taking money from Winston, but Taylor had never approached Thoman, (Tr. 1981) for protection for Taylor. Thoman also inquired of Winston about the $100 for Monroe. Winston said he would have it later. (Tr. 1077). This conversation was recorded on the Minifon. (Tr. 1090).

Winston at that time also advised Thoman that on July 1, 1954, he would bring Taylor to meet Thoman. (Tr. 1094).

Evidence of Overt Act No. 17 Upon Conspiracy Count

On July 1, 1954, Thoman met with Winston and Taylor at Bladensburg Road and Eastern Avenue, N. E., where Winston gave Thoman $100 to give to Monroe as the latter's first monthly payment. (Tr. 1094-1098). This testimony was objected to because it flowed from a telephone conversation that was unlawfully recorded. (Tr. 1097). At that time, Winston asked Thoman whether Officer Smith had information relative to the number location of some of his people. Winston departed and Taylor, who remained, was asked by Thoman if he could pay him $500 a month as protection for his (Taylor's) number business. (Tr. 1103). Taylor stated that he would send the money by Winston. Thoman was equipped with the Minifon but the battery was defective and only about five minutes of the conversation was recorded. (Tr. 1105, 1171).

Evidence of Overt Act No. 18 Upon Conspiracy Count and Evidence to Sustain Substantive Counts Nos. 7 and 8

On July 2, 1954, (Tr. 1107), Thoman called Anderson on the telephone from Maryland. There was attached to the phone the equipment and device heretofore described. A recording of the conversation was made. (Tr. 1109). Thoman had refreshed his recollection from his notes and the transcription of the recording. (Tr. 1111).

Over objection, (Tr. 1114), Thoman stated that he made an appointment to meet Anderson July 3, 1954. As a result thereof (Tr. 1125), Thoman and Anderson met. (Tr. 1125). Anderson gave Thoman $500. (Tr. 1126).

Over objection that the conversation then had was the result of an illegally tapped telephone conversation (Tr. 1127), Thoman told of a talk with Simkins to the effect that

he and Smith were no longer partners. (Tr. 1127). Simkins advised Thoman that Smith was in effect cheating him and also that Smith wanted him to go into the number business in Maryland and wanted Simkins to buy protection in Maryland. (Tr. 1127, 1128). Motion for mistrial was made and overruled because of the introduction of evidence of a separate and distinct offense.

During the conversation of July 3, 1954, Simkins delivered to Thoman $500 to protect Simkins' number office which Thoman did (Exhibit 18). (Tr. 1129, 1791). During this time, Thoman was equipped with the Minifon which recorded their conversation. (Exhibit 19). (Tr. 1146).

Exhibit 19 contained other conversations which the prosecutor advised the Court was not material to the matter then on trial. Counsel for the petitioners were denied the right to inquire as to the identity of the voices (Tr. 1149) or that which was recorded other than that introduced by the prosecution. The recordings, as selected by the prosecution and contained on Exhibit 19, were offered in evidence. (Tr. 1156). They were played out of the presence of the jury to all the parties and counsel. (Tr. 1158). The voices and information recorded on Exhibit 19 which were alleged to be immaterial to the matter on trial took 2½ minutes to play on one occasion (Tr. 1164) and 6½ minutes on another occasion. (Tr. 1172-1192).

Over objection, Exhibit 19 was played to the jury for the purpose of showing the conversation between Thoman and Winston on June 29, 1954 (Tr. 1194-1200) and the conversation among Thoman, Taylor and Winston on July 1, 1954 (Tr. 1201-1203) and between Thoman and Anderson on July 3, 1954 (Tr. 1204-1208) and between Thoman and Simkins on July 3, 1954 (Tr. 1218-1224). The evidence of other offenses erroneously introduced as contended by Smith showed the stealing or misappropriation of approximately $6,000 by Smith from Simkins (Tr. 1219-1220), and that Smith requested $2,000 of Simkins for the purpose of brib-

ing Maryland officials. (Tr. 1219). Motions to strike and for mistrial were made and overruled. (Tr. 1224-1225).

Evidence of Overt Act No. 19 Upon Conspiracy Count and Evidence to Sustain Substantive Count No. 9

On July 7, 1954, (Tr. 1233), Taylor telephoned Thoman. The Minifon device was used and a recording was made. An appointment was made to meet Taylor that night. (Tr. 1239). Over the objection that the meeting was the result of an illegally tapped telephone call (Tr. 1240), Thoman was permitted to state that Taylor met him at Bladensburg Road and Eastern Avenue, N. E., and asked him (Thoman) if he would take $300 per month instead of $500 until Taylor was in better financial shape. Thoman acquiesced and took $301 from Taylor. (Tr. 1241). (Exhibit 20). This conversation was also recorded on the Minifon. (Tr. 1254-1255). No police protection was to be given by Thoman on account of this to Anderson, Smith or Simkins (Tr. 1809), but King and Winston were being protected because they were partners of Taylor. (Tr. 1809, et seq.). Thereafter, no further money was paid by Taylor to Thoman.

Evidence of Overt Act No. 20 Upon Conspiracy Count and Evidence to Sustain Substantive Counts Nos. 10 and 11

On July 9, 1954, Thoman called Monroe at his home and recorded the phone conversation. Over objection on the grounds that it violated Section 605 of the Communications Act, he testified that he asked Monroe to meet him at 7:00 p.m. They met at Bladensburg Road and Eastern Avenue, N. E., and Thoman gave to Monroe the $100 Thoman had received from Winston and King. (Tr. 1268). The conversation was recorded on the Minifon. (Exhibit 21). (Tr. 1278-1279). This exhibit also contained conversations of approximately two minutes which the Government represented to the Court to be immaterial to the inquiry and which the Court refused to permit the defense to hear. (Tr.

1298). However, the Court did permit the defense counsel to hear out of the presence of the jury, the conversation between Taylor and Thoman at which time Taylor gave Thoman $301. (Tr. 1300-1330).

Twenty-one minutes of recorded conversations on the Minifon wire (Exhibit 21), which neither counsel nor the petitioners were permitted to hear (Tr. 1301), was then monitored by Thoman in order that he could arrive at the conversation of July 9, 1954, between him and Monroe. The latter conversation was then played to all save the jury. (Tr. 1305-1317).

Such portions of the conversations on Exhibit 21 as the prosecutor advised were material to the matters then in issue were offered and received in evidence over objection, (Tr. 1326-1328, 1331-1343). Exhibit 21 also contained a statement by Thoman to Monroe that Smith and Simkins had broken up. (R. 1333). Motion to strike was made by Smith and overruled. (Tr. 1336). Thereupon, petitioners moved to strike all of the recordings contained in Exhibit 21 and for mistrial. This also was overruled. (Tr. 1344-1349).

On July 11, 1954, Winston phoned Thoman, advised Thoman that he was moving his office to 1701 Third Street, N. E., because he had seen undercover police in the area of his office at the Rhode Island Plaza on several occasions. (Tr. 1351).

On July 14, 1954, Simkins phoned Thoman who recorded and monitored the conversation in the same manner as heretofore described. (Tr. 1354). Over similar objections of the petitioners, (Tr. 1353), Thoman stated that Simkins told him he had moved his office to 538 Shepherd Street. (Tr. 1356).

On August 18, 1954, Monroe phoned Thoman. This conversation was also recorded and monitored. (Tr. 1358-1359). Monroe asked Thoman to come by the 12th Precinct the next morning because he had certain information for him. (Tr. 1366).

Evidence of Overt Act No. 21 Upon Conspiracy Count and Evidence to Sustain Substantive Counts Nos. 12 and 13

On August 18, 1954, Thoman received a telephone call from Winston. (Tr. 1367). That conversation was recorded in the same way as the other telephone conversations. If asked the same questions relative to this conversation as had been asked relative to the other conversations, Thoman's answers would have been the same. (Tr. 1368). Over the objections of petitioners (Tr. 1369), Thoman testified that he then made arrangements to meet Winston at 9:30 p.m. (Tr. 1369). At that time Winston gave Thoman, $600, $100 of which was for Monroe. The motion to strike the latter testimony because of the illegal telephone call was denied. (Tr. 1370-1371). (Exhibit 22). Again Thoman testified that for this money no police protection was to be given to Simkins, Smith, Anderson or Taylor. (Tr. 1878). Winston at that time advised Thoman that he was transferring his business back to the Rhode Island Plaza. (Tr. 1372). This conversation was recorded on the Minifon. (Exhibit 23) (Tr. 1389).

Evidence of Overt Act No. 22 Upon Conspiracy Count and Evidence to Sustain Substantive Count No. 14

On August 19, 1954, Thoman went to the 12th Police Precinct and gave Monroe $100 and stated it was from Winston. (Tr. 1376). At that time, Monroe gave Thoman $200 and said it was from Pat (Hogland). Motion for mistrial was made because the latter transaction was made the basis for a separate and distinct conspiracy indictment (Cr. No. 980-54) which charged Monroe, Prather and others, none of whom were any of the defendants on trial, with crime. The motion was overruled. (Tr. 1376). At that time, Monroe also asked Thoman for Winston's telephone number. (Tr. 1377). This conversation was also recorded on Exhibit 23. (Tr. 1393).

Although the witness had a distinct personal recollection

of the conversations recorded on Exhibit 23, it was then played for all the parties and counsel and the Court but outside of the presence of the jury. The defense's request that the full recording on Exhibit 23 be played was denied. (Tr. 1409-1410). The recordings on Exhibit 23 contained four minutes of conversation prior to the conversation between Winston and Thoman on August 18, 1954, which the prosecution represented was not material to this inquiry and which the Court ruled could not be heard by the defense. (Tr. 1410-1419). The conversation that occurred between Monroe and Thoman recorded on Exhibit 23 was excluded by the Court because it was unintelligible, (Tr. 1427), but the recording of the conversation between Winston and Thoman was played to the jury over the objection of the defense. (Tr. 1427, 1429, 1438).

Evidence of Overt Act No. 23 Upon Conspiracy Count and Evidence to Sustain Substantive Count No. 15

Over the objection of the petitioners, Thoman testified that on August 19, 1954, as a result of a telephone conversation between Thoman and Simkins (monitored as heretofore described), they met. (Tr. 1440-1441). Simkins advised Thoman that Anderson was broke and a large number of the operators were broke. (Tr. 1443). At that time, Simkins gave Thoman $500 (Exhibit 24), and stated that his office was at 539 Shepherd Street, N. W., and for Thoman to watch out for it (Tr. 1443) and give that office police protection. (Tr. 1883). Simkins stated that Taylor wanted him to handle his number work but that he could not do it. (Tr. 1443).

As in all the other transactions, Thoman conceded that this money was not to protect the other petitioneers' places of business. It was not for King, Winston, Taylor or Anderson. (Tr. 1884).

Evidence of Overt Act No. 24 Upon Conspiracy Count and Evidence to Sustain Substantive Count No. 16

On September 8, 1954, Thoman received a telephone call from Winston, which was monitored in the same fashion as prior calls. (Tr. 1470). Transcripts were made of that recording. (Tr. 1471). Over the objection of petitioners (Tr. 1471), Thoman stated that arrangements were made to meet Winston the next night. (Tr. 1472).

Over objection of petitioners (Tr. 1478-1479), Thoman was permitted to state that on September 9, 1954, at Bladensburg Road and Eastern Avenue, N. E., Winston gave Thoman $600 (Exhibit 25), $100 of which he stated was for Monroe (Exhibit 26) (Tr. 1480). For this sum no protection was to be given to Simkins or Smith. (Tr. 1890).

On September 14, 1954, Thoman phoned Monroe and requested him to meet him at Bladensburg Road and Eastern Avenue, N. E., at 7:00 p.m. (Tr. 1494). Thoman also testified that on that date, Prather phoned him and stated that he was trying to contact Langley and Sasisan and that he had left word for them to contact him. (Tr. 1497). Motion for mistrial was made because of this evidence which was immaterial to the present inquiry and unrelated to this conspiracy count and in fact was an overt act in a conspiracy case then pending in the Court below, (Cr. No. 980-54). (Tr. 1497). Prather also requested Thoman to meet him at 8:00 p.m. (Tr. 1498).

Evidence of Overt Act No. 25 Upon Conspiracy Count and Evidence to Sustain Substantive Counts Nos. 17 and 18

On September 14, 1954, Thoman met Monroe at Bladensburg Road and Eastern Avenue, N. E., and gave him $100. Immediately prior thereto, and at a nearby point, Thoman had met Deputy Chief Lutz, Captain Layton and Inspector Johnson, local police officials. Those officials searched his person and removed from Thoman everything except the five $20 bills which were introduced in evidence as Exhibit

26. (Tr. 1499-1502). Within a few minutes thereafter, Monroe was placed under arrest by Lutz who removed Exhibit 26 from his person. (Tr. 1503). Monroe at that time advised Lutz that the money was a repayment of a loan theretofore made. (Tr. 1504).

Evidence of Overt Act No. 26 Upon Conspiracy Count and Evidence to Sustain Substantive Count No. 19

On September 14, 1954, at about 9:00 p.m., Thoman called Simkins and requested him to meet him at Bladensburg Road and Eastern Avenue, N. E. Simkins and Anderson met Thoman there. (Tr. 1507).

At that time, Simkins told Thoman that Smith was doing a lot of knocking and wanted $2,500 from Simkins to take care of somebody. (Tr. 1509).

A motion for mistrial was made because of the introduction in evidence of separate and distinct crimes not in any manner material to the charges laid in the indictment. The motion was overruled. (Tr. 1511).

At that time Simkins, in payment for protection for Simkins' number office also gave Thoman $500. (Exhibit 27) (Tr. 1900). This was not for the protection of Taylor, King, Winston or Anderson. (Tr. 1902).

The Government introduced testimony as to the technical police duties of Monroe and Prather. It then rested.

Motions for judgment of acquittal on behalf of all the petitioners were made based, among other grounds, on the fact that the indictment charged one conspiracy while the proof was directed to several and, therefore, a fatal variance resulted. (Tr. 2420-2507). The motions were overruled.

DEFENSE TESTIMONY

Phillip Martin, a sound recording expert, was called by the defense. (Tr. 2545). He said that he was familiar with the Minifon (Govt. Exhibit 3) as well as Government Exhibit 8, the suction cup and coil used by the police to

record the telephone conversations between Thoman and some of the defendants. He explained how the induction coil of Exhibit 8 was plugged into the Minifon to record telephone conversations and that in the trade this was called a "phone tap." (Tr. 2549-2550). He testified as to how a phone tap was made, (Tr. 2550-2556), and that the use of Government Exhibit 8 was about 70 per cent as effective as a physical connection between wire and wire. (Tr. 2557).

The defense then proferred a demonstration of the operation. (Tr. 2558). The Court declined to permit it to be done. (Tr. 2565). The witness also indicated how the Minifon wire could be edited and dubbed, (Tr. 2566), and that words could be erased and inserted. (Tr. 2572-2573).

Prather and Monroe then sought to introduce their official police personnel files showing their commendations. Although the Court permitted some of Prather's personnel file to go in, it eventually changed its mind and expunged from the record what had been introduced by him and prohibited any at all for Monroe. (Tr. 2583-2627).

Both sides then rested and the defense renewed their motions for acquittal and mistrial. (Tr. 2631). The petitioners then moved for a severance based upon the prejudice resulting because of the commingling of evidence against the petitioners. (Tr. 2651).

Thereafter, the verdict and judgment of the Court was entered as hereinbefore set forth, and was affirmed by the Circuit Court.

REASONS FOR GRANTING THE WRIT

Fatal Variance and Misjoinder of Offenses and Defendants

1(a) and (b) The decision of the court below in the instant case (Appendix B and C), upon Question One is directly in conflict with the decision of this Court in *McElroy* v. *United States*, 164 U. S. 76; *Kotteakos* v. *United States*, 328 U. S. 750; *Kidwell* v. *United States*, 38 App. D. C. 566;

District of Columbia v. *Hunt*, 163 F 2d 833; Rule 8(a) and 8(b) F.R.Cr.P. The decision on this question is also in direct conflict with the conclusions as to what the evidence showed, with the United States Circuit Court of Appeals for the Second Circuit in *Kotteakos*, 151 2d 170, on a similar state of facts.

The Court of Appeals for the Second Circuit in *Kotteakos*, supra, stated that the trial court "was plainly wrong in supposing that upon the evidence there could be a single conspiracy; and in the view which he took of the law, he should have dismissed the indictment". Nevertheless, the appellate court held the error not prejudicial, saying among other things "especially since guilt was so manifest, it was proper to join the conspiracies", and "to reverse the conviction would be a miscarriage of justice". The government contended in that Circuit Court that there was only one conspiracy proven by the evidence; after that Circuit Court held as hereinbefore stated, the government did not contend in the Supreme Court that there was no variance in proof from the single conspiracy charged in the indictment. Admitting that in this Court for the first time that separate and distinct conspiracies were shown, it urged that the variance was not prejudicial to the petitioners. This Court in *Kotteakos, supra*, decided that there occurred a fatal variance affecting the substantial rights of the petitioners, and not harmless error, because the proof made out a case, not of a single conspiracy, but of several, notwithstanding only one was charged in the indictment, and stated as follows:

> "The question we have to determine is whether the same ruling (as *Berger*) may be extended to a situation in which one conspiracy only is charged and at least eight having separate, though similar objects, are made out by the evidence, if believed; and in which the more numerous participants in the different schemes were, on the whole, except for one, different persons who did not know or have anything to do with one another."
>
> * * *

"On the face of things it is one thing to hold harmless the admission of evidence which took place in the Berger Case, where only two conspiracies involving four persons all told were proved, and an entirely different thing to apply the same rule, where as here, only one conspiracy was charged, but eight separate ones were proved involving at the outset thirty-two defendants. The essential difference is not overcome by the fact that the thirty-two were reduced by severance, dismissal or pleas of guilty, to nineteen when the trial began and to thirteen by the time the cases went to the jury. The sheer difference in numbers, both of defendants and of conspiracies proven, distinguishes the situation. Obviously the burden of defense to a defendant, connected with one or a few of so many distinct transactions, is vastly different not only in preparation for trial, but also in looking out for and securing safeguard against evidence affecting other defendants, to prevent its transference as 'harmless error' or by psychological effect, in spite of instructions for keeping separate transactions separate."

"The Government's theory seems to be, in ultimate logical reach, that the error presented by the variance is insubstantial and harmless, if the evidence offered specifically and properly to convict each defendant would be sufficient to sustain his conviction, if submitted in a separate trial. For reasons we have stated and in view of the authorities cited, this is not and cannot be the test under Sec. 269. But in apparent support of its view the Government argues that there was no prejudice here because the results show that the jury exercised discrimination as among the defendants whose cases were submitted to it. As it points out, the jury acquitted some, disagreed as to others, and found still others guilty. From this it concludes that the jury was not confused and apparently, reached the same result as would have been reached or would be likely, if the convicted defendants had been or now should be tried separately."

"One difficulty with this is that the trial court itself was confused in the charge which it gave to guide the jury in deliberation. The court instructed:

'The indictment charges but one conspiracy, and to convict each of the defendants of a conspiracy the Gov-

ernment would have to prove, and you would have to find, that each of the defendants was a member of that conspiracy. You cannot divide it up. It is one conspiracy, and the question is whether or not each of the defendants or which of the defendants, are members of that conspiracy.'

"On its face, as the Court of Appeals said, this portion of the charge was plainly wrong in application to the proof made; and the error pervaded the entire charge, not merely the portion quoted. The jury could not possibly have found, upon the evidence, that there was only one conspiracy. The trial court was of the view that one conspiracy was made out by showing that each defendant was linked to Brown in one or more transactions, and that it was possible on the evidence for the jury to conclude that all were in a common adventure because of this fact and the similarity of purpose presented in the various applications for loans."

"This view, specifically embodied throughout the instructions, obviously confuses the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character. It may be that, notwithstanding the misdirection, the jury actually understood correctly the purport of the evidence, as the Government now concedes it to have been; and came to the conclusion that the petitioners were guilty only of the separate conspiracies in which the proof shows they respectively participated. But, in the face of the misdirection and in the circumstances of this case, we cannot assume that the lay triers of fact were so well informed upon the law or that they disregarded the permission expressly given to ignore that vital difference. Bollenbach v. United States, supra (326 US 612, ante, 354, 66 S Ct 402)."

The question of whether there was a fatal variance affecting the substantial rights of petitioners is determined by the evidence and does not require the filing of, or making a motion for severance, or election. However, a motion for severance was considered and overruled by the District Court prior to trial, and a further written motion entitled "motion to dismiss" was treated and acted upon by the

District court and counsel for both sides as a motion for severance (Tr. 3172, 3178, 3179), and was overruled prior to trial. The motion for severance was orally renewed and overruled at the outset of the trial, before the jury was sworn, and renewed and overruled after the jury was sworn (Tr. 166, 167, 168, 169, 172, 173, 174, 181, 187). Despite the fact that a written motion filed before trial was labelled a motion to dismiss, the court had the right to, and did treat it as a motion for severance.

In view of the fact that the court overruled a motion for a bill of particulars prior to trial, there really was no intelligent way for the petitioners to urge a severance upon the court prior to trial. The indictment charged a single conspiracy and substantive counts of bribery allegedly fitting into the overt acts of the conspiracy count. Consequently, the joinder of all the substantive counts in this indictment would have been proper if the evidence fell within Rule 8 (a) and 8 (b) of the Federal Rules of Criminal Procedure. However, as hereinbefore shown, the evidence does not do so. Prior to trial, the court assumed that the Government would prove one conspiracy and that each of the substantive offenses would fall within this one conspiracy. Without knowledge of what the evidence would be at this stage, the trial court had nothing before it on which to grant a severance.

In view of the above, the only way in which it could appear that more than one conspiracy existed and that there was a misjoinder of offenses and defendants was by hearing the evidence. Because no bill of particulars was ordered to be given, the trial court could rule on the question of misjoinder only after the evidence was in. That was done by a motion for a judgment of acquittal on the ground of a fatal variance, because of proof of several conspiracies when only one was alleged (Tr. 263).

Without the conspiracy count in the indictment, there would have been a patent misjoinder of offenses, for the indictment would have shown on its face that separate and

distinct offenses were improperly joined. The vice of this is not cured by an acquittal of some of the petitioners on the conspiracy count. The acquittal of a certain petitioner under the conspiracy count does not show that he was not substantially prejudiced.

Under the circumstances, the verdict of the jury may well have been one of compromise rather than "selectivity".

As in the *Kotteakos* Case, the trial court here was plainly wrong in refusing to grant a motion for judgment of acquittal because of misjoinder of offenses and defendants, and her charge to the jury on conspiracy was plainly wrong in application to the proof made. Here also, the jury could not possibly have found, upon the evidence, that there was only one conspiracy. The trial court was of the mistaken view that one conspiracy was made out by showing that each petitioner was linked to Thoman in one or more transactions, and that it was possible on the evidence for the jury to conclude that all were in a common adventure because of this fact and the similarity of purpose presented in allegedly giving Thoman money for protection. Considering the Government's evidence in its most favorable light, we submit that eight conspiracies were allegedly proven, and that a fatal variance affecting the substantial rights of the accused resulted by charging and trying them together on a single conspiracy count and proving several conspiracies. (Tr. 3051).

For the reasons hereinbefore urged, the judgment below should be reversed not only as to Monroe and Prather, who were convicted of conspiracy, but as to all petitioners on all counts under the rationale of the law announced in *McDonald* v. *United States*, 335 U. S. 451; *Nelson* v. *United States*, 93 U. S. App. D. C. 14, 208 F. 2nd. 505, 514; *United States* v. *Thompson*, 113 F. 2nd 643 (CCA 7th, 1940).

Had those who were acquitted of conspiracy been tried on the substantive counts alone, the commingling of prejudicial testimony, of which we complain, could not have occurred.

In the case of *Smaldone* v. *United States*, 348 U. S. 961,

the question of the prejudicial commingling of evidence on conspiracy and substantive counts was raised in the petition for certiorari together with other questions. There, this Court in the exercise of its supervisory powers granted certiorari and summarily reversed. Because of the summary reversal, it is impossible to tell whether the Court considered this point.

Further the joinder of the offenses and defendants as charged in the indictment was a violation of Rule 8 (a) and (b) of the Federal Rules of Criminal Procedure. Such joinder, not only in the single conspiracy count, but of the substantive counts in the same indictment, substantially prejudiced the defendants, especially since they were tried together. The testimony of Thoman constituted the evidence against appellants on both the conspiracy and substantive counts. The testimony adduced to establish the alleged single conspiracy was intermingled with the proof on the various substantive counts. It is obvious that if separate indictments had been returned against appellants, they could not properly have been consolidated for trial.

As heretofore shown from the evidence, the offenses allegedly committed by the appellants were not of the same or similar character, were not based on the same act or transaction, or on two or more acts or transactions connected together, or constituting parts of a scheme or plan. It is further obvious from the evidence that the appellants did not participate in the same act or transaction, or in the same series of acts or transactions. The offenses with which the appellants were charged, and the evidence adduced to prove them, showed that they were substantive offenses, separate and distinct, complete in themselves, and independent of each other, committed at different times, and not provable by the same evidence.

On the proposition of improperly charging and trying together of offenses, and defendants, this Court in *Kotteakos, supra,* stated: (773)

"Criminal they may be, but it is not the criminality

of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

"Here toleration went too far. We do not think that either Congress, when it enacted sec. 269, or this Court, when deciding the Berger Case, intended to authorize the Government to string together, for common trial, eight or more separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all. Leeway there must be for such cases as the Berger situation and for others where proof may not accord with exact specifications in indictments. Otherwise criminal conspirators never could be brought to halt. But if the practice here followed were to stand, we see nothing to prevent its extension to a dozen, a score, or more conspiracies and at the same time to scores of men involved, if at all, only separately in them. The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place. Section 269 had no purpose to go so far. The line must be drawn somewhere. Whether or not *Berger* marks the limit, for this sort of error and case, we are clear that it must lie somewhere between that case and this one."

For example, in the case of appellant Smith, he would have been tried as an aider and abettor of the bribery of Thoman on June 9, 1954, as alleged in count five and on no other count; in the case of Taylor, he would have been tried for bribery of Thoman on July 7, 1954 as alleged in count nine and no other count. It was most improbable, if not impossible, for the jury to separate, in all cases of all the petitioners, the wheat from the chaff with regard to the

evidence restricted to the conspiracy count only. The sifting of testimony even for experienced trial lawyers and judges is difficult. It is pure sophistry to hope that a jury can do so.[1] The evil of a highly publicized mass trial and the conglomeration of testimony admissible only because of the conspiracy charge, must have weighed heavily in the ultimate finding of guilt as to all petitioners. To be sure, the Court instructed the jury that the testimony on the conspiracy count was limited to that count only. In this case, we feel that placed too heavy a burden on the jury. No amount of caution by the trial judge could erase the effect of evidence introduced to establish a conspiracy alleged to have existed for almost a year and which the verdict below established never existed at all insofar as the petitioners Anderson, Winston, King, Taylor, Simkins and Smith were concerned. This is particularly so when we consider that the trial lasted over a month. At one time, the jury advised the Court that it could not agree (Tr. 3067).

For example, as to Smith, the introduction of hearsay evidence of separate and distinct crimes of theft and bribery (Tr. 1127, 1128, 1509) compel the conclusion that prejudicial error occurred.

Insofar as Taylor is concerned, the trial on the substantive offense with which he was charged (count 9) would have taken less than a day. The same would apply to count 5 with relation to Smith.

In addition to the conspiracy count, King was charged in nine counts with the substantive offense of bribery. He was acquitted of all save one (Count 4) wherein he is alleged to have aided and abetted the giving of a bribe by Winston to Thoman. However, Winston was acquitted. It cannot be rationally argued that the mingling of all of the testimony produced below did not cause the jury to say, "With all this smoke, there must be some fire."

A mass trial such as was had here, producing testimony

[1] Cf. Schaffer v. United States, 221 F. 2nd. 17, 19 (CCA 5, 1955); United States v. Haupt, 136 F. 2nd. 661, 672 (CCA 7th, 1943).

taking over a month to present, causes grave danger to any defendant. There is ever present the risk and real peril that the jury will transfer, consciously or otherwise, the testimony to prove the conspiracy count to the substantive counts.

In *Blumenthal* v. *United States,* 332 U. S. 539, 559, the Court said:

> "That danger was real. It is one likely to arise in any conspiracy trial and more likely to occur as the number of persons charged together increases. Perhaps even at best the safeguards provided by clear rulings on admissibility, limitations of the bearing of evidence as against particular individuals, and adequate instructions, are insufficient to ward off the danger entirely. It is therefore extremely important that those safeguards be made as impregnable as possible."

Mr. Justice Jackson in his concurring opinion in *Krulewitch* v. *United States,* 336 U. S. 440, 445, stated:

> "This case illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the 'tendency of a principle to expand itself to the limit of its logic.' The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice."
>
> * * * "The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. Blumenthal v. United States, 332 U. S. 539, 559, 92 L. Ed. 154, 169, 68 S. Ct. 248, all practicing lawyers know to be unmitigated fiction. See Skidmore v. Baltimore & O. R. Co. (CCA 2nd, N. Y.) 167 F. 2nd. 54."

Furthermore, the acquittal on the conspiracy count of six of the eight petitioners brings sharply into focus the peril, in a case of this sort, of the rule that acts and declarations of co-conspirators made in furtherance of the conspiracy

and while it is pending are admissible against all. But the prosecution must first establish a conspiracy and the identity of the conspirators.

In *Krulewitch* v. *United States,* 336 U. S. 440, 453, this Court said:

> "When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish prima facie the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the courts of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodge-podge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed."

See also *Montford* v. *United States* (CCA 5th, 1952) 200 F. 2nd. 759, 760, and cases there cited; *United States* v. *Goodman,* 129 F. 2nd. 1009, 1013 (CCA 2nd, 1942).

In *May* v. *United States,* 84 U. S. App. D. C. 233, 175 F. 2nd. 994, 1008, the Court said: Pages 1007-1008

> "* * * The rules are that one defendant's connection with a conspiracy cannot be established by the acts or declarations of *other* defendants in his absence, and that a defendant cannot be bound by the acts or declarations of *other* defendants until (a) the conspiracy has been established and (b) the defendant's participation in the conspiracy has been established."

Here, insofar as six of the eight petitioners were concerned, their participation in the conspiracy was not only not established, but the jury found they did not participate in the conspiracy at all. Hence, the condition upon which the various acts and declarations of alleged co-conspirators was admissible, failed.

This case is a clear example of the misuse by the prosecu-

tion of a conspiracy count so that it may join in the same indictment many unconnected substantive offenses with the hope of conviction because of the sprawling character of the conspiracy charge.

Petitioner Smith further sought a severance on the ground that he would be adversely affected by the prejudicial commingling of testimony and participation in a mass trial (Tr. 188). Overt acts charged to him in the conspiracy count occurred on June 9, 1954, and June 21, 1954. The prosecution conceded he was not therafter an alleged co-conspirator (Tr. 1190). The verdict establishes he never was.

Anderson, also acquitted of conspiracy, was convicted on three counts of bribery. He was charged in five of the substantive counts. It seems plain that Anderson, alleged to be the hub of the wheel in the conspiracy count, was prejudiced on the substantive counts on which he was convicted by the evidence introduced to sustain the conspiracy of which he was acquitted. However, as urged above, the Anderson substantive counts standing alone could not be joined with the counts against Winston, King, Taylor, Simkins or Smith. There was no concert of action (Rule 8 F. R. Cr. P.; Barron and Holtzoff, Vol. 4, Section 1932, page 83 and cases there cited.)

Simkins, acquitted of conspiracy, was charged and convicted on four counts of bribery (Counts 5, 8, 15 and 19). Smith was the aider and abettor in Count 5, but not connected in any manner with the remaining Simkins counts.

The joinder in a single indictment of so many unconnected bribes of Thoman by different individuals at different times for a different purpose, although it was similar in character, was prejudicial and reversible error.

The government must charge in separate indictments defendants accused of independent offenses. *Nazzaro* v. *United States* (CCA 10th, 1932) 56 F. 2nd. 1026, 1028; *Coco* v. *United States* (CCA 8th, 1923) 289 F. 33; *United States* v. *Dietrich* (CCA 8th, 1904) 126 F. 664.

The Court in *District of Columbia* v. *Hunt*, 82 U. S. App. D. C. 159, 163 F. 2nd. 833, 837, said:

> "* * * It is a fundamental of our system of law that one person shall not be held criminally responsible for the independent act of another. And the fate, in a consolidated trial, of one defendant can hardly be unaffected by evidence relating to the acts of others."

In *McElroy* v. *United States*, 164 U. S. 76, it was held:

> "* * * While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the court to quash the indictment or to compel an election, such joinder cannot be sustained where the parties are not the same and where the offenses are in nowise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions."

See also Kidwell v. U. S., 38 App. D. C. 566.

As said in *Marcante* v. *United States* (CCA 10th, 1931) 49 F. 2nd. 158:

> "It is extremely difficult for an experienced trial judge to trace the skeins of scattered testimony to so many individuals; with inexperienced jurors such complicated testimony is too apt to become but a confused jumble, and a verdict too apt to represent an impression that the defendants are guilty of something, with little reference to the crime with which they are charged."

We submit that substantial prejudicial and reversible error occurred because of the fatal variance and prejudicial joinder as hereinbefore discussed.

INSPECTION AND DISCOVERY

2. The decision of the court below (App. B) in the instant

case upon Question 2 is in direct conflict with Rules 16 and 17 (c) of the Federal Rules of Criminal Procedure. The decision is also in direct conflict with the decision of this Court in *Bowman Dairy Co.* v. *United States,* 341 U. S. 214; *Gordon* v. *United States,* 344 U. S. 414; *Nardone* v. *United States,* 308 U. S. 338, 341; and with *Fryer* v. *United States,* 207 F. 2d 134 (CADC). That decision (App. B) of the Court below was based on the mistake of the Court as to the true facts, when it stated:

> "However, the court did not abuse its discretion in denying appellants' requests, because the accused had already been accorded by the Government an opportunity to inspect the recordings. * * * And the argument now made that appellants were entitled to make stenographic transcripts of the recordings, or in lieu thereof to be furnished copies of the transcripts made by the Government, was not pressed upon the trial court in any of the motions for pretrial discovery or production to which we have referred. Nor does it appear that permission was asked of the Government, and denied, to make a transcript at the time the recordings were played for the benefit of the defendants. Consequently, appellants cannot now complain that they were deprived of any right to have a transcript."

The Petitions for Rehearing in the court below set forth the true facts on this question, and said true facts also are set forth in the Statement of this petition. The court below in denying the Petitions for Rehearing (App. C) after the true facts were called to its attention, admitted that petitioners did press for the right to make stenographic transcripts of the recordings or to be furnished copies of transcripts by the government. Nevertheless, the court below adhered to its decision of April 30, 1956, and stated further, in substance, that the refusal of the trial court to permit petitioners to make stenographic transcripts of the recordings or to be furnished copies of the government's transcripts was not reversible error because the defendants heard those parts of the recordings actually admitted in

evidence when they were played out of the presence of the jury during the trial, to aid the trial court in ruling upon their admissability. It must be remembered that this playing occurred immediately prior to the admission of the recordings in evidence. As a matter of fact, petitioners were denied the right, on many occasions, to hear the recordings.

It is contended that the trial court committed reversible error in denying petitioners an opportunity to inspect, or to make or have made, stenographic notes and transcripts of the recordings, or to make recordings of the recordings, or to have a transcript of the recordings furnished them prior to trial. It is contended that the trial court committed reversible error because there was a showing made that the items sought in the motions and subpoena were material to the preparation of the defense, that the request was reasonable and not oppressive, would not have resulted in a "fishing expedition", and no sound reasons were offered by the government for precluding pretrial inspection of the recordings prior to the trial.

There was a policy of non-disclosure of conversations adopted by the prosecutors as to conversations recorded on the magnetic wire introduced as Exhibit Nos. 9, 11, 14, 19, 12 and 23 (Tr. 623, 625, 776, 790, 809, 810, 1011, 1012, 1025, 1157, 1298, 1409 and 1410). No one but the prosecutors and the police knew or were advised of the character or purport of such undisclosed conversations. Whether pertinent, incriminatory or exculpatory, no one save the prosecution and the police knew. Not even the Court was advised of the undisclosed conversations (Tr. 790).

This refusal to permit the inspection by the defense of a document in the possession of the prosecution, which very possibly could have been vital to the defense, was arbitrary and unreasonable. It runs counter to the law as recited in Wigmore, 3rd Edition, Volume VI, page 386, Section 1847 (4) and Section 1861, page 477.

The recorded conversations which petitioners were not

permitted to hear, but which were played inaudibly, so that the witness alone could hear them, took an appreciable length of time to play.

> Exhibit 9 took five minutes on one occasion (Tr. 625), and three minutes on another (Tr. 647);
>
> Exhibit 11, two or three minutes (Tr. 730);
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> Exhibit 13, 30 minutes (Tr. 905);[1]
>
> Exhibit 14, ten minutes (Tr. 1028);
>
> Exhibit 19, two and one half minutes on one occasion (Tr. 1164) and six and one half minutes on another (Tr. 1172, 1192);
>
> Exhibit 21, two minutes on one occasion (Tr. 1298), and 21 minutes on another (Tr. 1301);
>
> Exhibit 23, four minutes (Tr. 1410, 1419).

We submit that it was error to preclude us from knowing the full contents of the exhibits introduced.

In Gordon v. *United States*, 344 U. S. 414, 417, 418, the accused requested the trial Court to require production of statements made by a witness against him. The trial Court declined. The Supreme Court said:

> "The request by the accused to order production of Marshall's earlier statements was cast in terms of obtaining access to documentary evidence rather than an offer that would require a ruling on its admissibility. But the Government apparently concedes, as we think it must, that if it would have been prejudicial error for the trial judge to exclude these statements, had the defense been able to offer them, it was error not to order their production. The relation of admissibility to production for inspection is by no means settled in the various jurisdictions, but we conclude that the Government does not concede enough. Demands for

[1] The Court's attention is respectfully invited to page 913 of the record, where the prosecutor stated:

"MR. TROXELL: May the Government call Lt. Beall? I might state for the record, if the Court please, that during the noon hour pursuant to the request of the Government and pursuant also to the Court's permission, Exhibit 13 was placed in the Minifon while I was observing and it was run for approximately thirty minutes to reach the point where this particular conversation begins."

production and offers in evidence raise related issues but independent ones, and production may sometimes be required though inspection may show that the document could properly be excluded."

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"Indeed, we would find it hard to withstand the force of Judge Cooley's observation in a similar situation that 'The State has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons.'"

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"It is unnecessary to decide whether it would have been reversible error for the trial judge to exclude these statements once they had been produced and inspected. For production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule; for rarely can the trial judge understandingly exercise his discretion to exclude a document which he has not seen, and no appellate court could rationally say whether the excluding of evidence unknown to the record was error, or, if so, was harmless."

In *United States* v. *Burr*, Fed. Cas. No. 14,694, the Court held that a paper in the possession of the prosecution could be obtained by the defense if an averment was made that "it may be material" to the defense.

In *Asgill* v. *United States*, 60 F. 2nd, 776, 779 (CCA 4th, 1932), a conviction was reversed because the trial Court refused to require the government to produce certain letters for cross-examination. Here, we do not know what the undisclosed portion of the recordings would show. The statement by the prosecutor that the conversations recorded on the various exhibits were not material to the issue is obviously an inadequate reason for non-disclosure. The facts contained in the undisclosed recordings could very well have been a basis for further cross-examination of Thoman.

In view of these circumstances, it was error to preclude

any knowledge to the petitioners of the full contents of the various exhibits.

During the entire trial, the prosecution staff was in possession of a typewritten transcript of the recordings (Tr. 807) made by a stenographer, who played them many times in order to transcribe them (Tr. 771, 772). The defense was denied copies thereof or even an opportunity to examine the typed transcript.

In *People* v. *Stephens*, 117 Cal. App. 2d 653, 256 P. 2d 1033, the District Attorney and the Court had a transcript of the recordings made of a defendant's conversation with the authorities. There, as here, the defense was denied copies of the stenographic transcript of the recordings. Here, not even the Court had a transcript, but it is reasonable to suppose that one would have been furnished the Court if requested.

The California Court in reversing the Stephens conviction did not comment on the failure to furnish copies but said (Page 1040):

> "This case is one wherein there is lacking that element of fairness essential to due process."
>
> Fairness, reason, justice and our tradition of due process, compel the conclusion that prejudicial error occurred.

It is further contended that the invitation by the prosecution to petitioners under the limitations set forth in question 3(b) of this Petition was not a compliance with Rule 17 (c) of the Federal Rules of Criminal Procedure.

It is further contended that there was a violation of petitioners' rights under Rule 17(c) of the Federal Rules of Criminal Procedure, and that the trial court erred in denying petitioners' requests that he order the prosecution to permit petitioners (1) to take stenographic notes of the aforementioned recordings, or (2) to make recordings of them, or (3) to have a court reporter do so when they were *invited* by the prosecution to be present while it attempted a play-back of alleged recordings of the original recordings

in this and four other cases only under the conditions set forth in Question 3(b).

EVIDENCE OF DISTINCT OFFENSES

3. The witness Thoman testified that petitioner Simkins told Thoman that "Simkins took a pistol away from a pimp and beat him up." Motion to withdraw a juror and continue the case was made and denied. The Court then said to the jury:

> The jury will disregard the statement as being a statement of any offense, the statement that the witness has just made concerning what Simkins said. (Tr. 984).

It needs no citation of cases to demonstrate that, in a criminal case, proof of separate and distinct offenses is reversible error. The trial Court did not cure the error by its instruction to the jury to "disregard the statement *as being a statement of any offense** * *." (Italics supplied.) What the witness had said about Simkins was a statement of two offenses—assault and larceny.

The least the trial Court should have done was to tell the jury to disregard the statement in its entirety; that such statement was not proof or evidence of the guilt of the offenses charged against the defendant and should not be considered, as such, by them. That is the accepted and usual course of judicial proceedings. Citation of authority would lend no strength to that statement.

Such a departure from the accepted and usual course of judicial proceedings should entitle petitioner to review.

THE WIRE TAPS

4. Petitioners claimed in the trial Court that Lieutenant Thoman of the Metropolitan Police Force of the District of Columbia, had illegally tapped the telephones of the petitioners and that a violation of the Federal Communications Act, Tit. 47 U.S.C. Sec. 605, had occurred, in that the Government had not only introduced evidence of conversa-

tions recorded by such taps but had also introduced evidence of the acts, transactions and conversations which were the direct result of the illegal taps. It appears that Thoman talked with the petitioners on the illegally tapped telephones and made appointments to meet them, at which latter time and place alleged bribes were discussed with Thoman and bribes were alleged to have been given to Thoman.

Thoman testified that he attached a suction cup to the end of the telephone to which the ear is placed; that a wire, which picked up the conversation, ran from the suction cup to the Minifon machine and the Minifon thus was able to record the incoming and outgoing conversation. (Tr. 571-575).

The only expert witness, who testified as to the manner of such recording, testified that, when the suction cup was attached to the receiving end of the telephone, and a message came in, the current passing through the telephone receiver set up a magnetic field which carried the telephone conversation from the telephone wire to the wire attached to the suction cup and into the Minifon which recorded all of the telephone conversation on a wire. (Tr. 2551). The suction cup apparatus acted as a syphon through which the telephone conversation was drained off of the telephone wire and into the Minifon.

It was stipulated by the Government that none of the petitioners consented to the use of the recording device, that no permission for recording or playing of any recording was sought from the petitioners and that no signal as to the use of a recorder was ever given. (Tr. 973).

Each meeting between the witness Thoman and the petitioners in which bribes were alleged to have been passed to Thoman was arranged by the monitored telephone calls, except the meetings of June 21 (Tr. 980), August 19, (Tr. 1356), September 14, (Tr. 1492, 1495, 1506). The other meetings were the direct results of telephone calls, monitored in identical manner by the witness Thoman. (Tr. 714,

757-8, 887 and 2069, 1003, 1077, 1125, 1241, 1320-1, 1440-3).

Petitioners either made an attempt to object to the "fruits of the poisoned tree" or actually did make such objection.

The Attempts to Object

When evidence of telephone conversations between that prosecution witness and the petitioners was first offered by the Government, the trial Court summarily denied petitioners the right to any inquiry whatsoever as to whether or not there was any illegal tapping of telephones, refused counsel the right to state the grounds of objection or to satisfy the Court that the accused could not, at an earlier date, have had adequate knowledge to make their claims of illegal wire tapping. (Tr. 217, 221, 241, 393, 413). (Each petitioner had the benefit of these objections, as it was stipulated between the Government and petitioners that the motion and objection of one petitioner would apply to all petitioners. Tr. 11, 17-18, 601, 816.)

In *Nardone* v. *United States*, 308 U.S. 338, the Court laid down the rule for the conduct of a trial Court in such an instance. At 308 U.S. 342, we find:

> • • • And if such a claim (of illegal tapping) is made after the trial is under way, the judge must likewise be satisfied that the accused could not at an earlier stage have had adequate knowledge to make his claim. The civilized conduct of criminal trials cannot be confined within mechanical rules. It necessarily demands the authority of limited direction entrusted to the judge presiding in federal trials, including a well-established range of judicial discretion, subject to review on appeal, in ruling upon preliminary questions of fact. Such a system as ours must, within the limits here indicated, rely on the learning, good sense, fairness and courage of federal trial judges.

From the above listed instances this Court can readily appreciate that the trial judge would not allow counsel to state the basis of his objection to the admission of the

telephone conversation as evidence against the petitioners; that the trial Court would not permit the petitioners to satisfy the Court that the accused could not at an earlier date have had adequate knowledge to make their claim of illegal wiretapping; and, with due respect, that the "good sense" and "fairness" spoken of in the second Nardone Case were lacking in this trial.

The Objections Made

It appears that the Government offered in evidence the statements of Thoman that he talked to petitioners on a telephone that had been tapped and made appointments with them for a meeting, at which times he was asked what was said and done and the petitioners objected on the ground that such evidence was the direct result of said illegal telephone taps and was inadmissible.

For example, before Thoman was permitted to tell about receiving Five Hundred ($500.00) Dollars from Simkins on August 19, 1954 (Tr. 1443), counsel for Simkins objected to the admission of that evidence on the ground that it was "had as a result of a telephone conversation" of the day before, which was monitored (Tr. 1441-2).

Similar specific objections were made as to other transactions with other accused. (Tr. 901, 1081, 1097, 1239, 1240, 1268).

From the colloquy between Court and counsel (Tr. 739-752) it also appears that there was a general objection made to the admission in evidence of all transactions and conversations which were the direct or indirect result of tapped or monitored telephone conversations with the accused.

Petitioners, in claiming that such taps and recordings were illegal and in contravention of the Communications Act, relied upon *United States* v. *Polakoff*, 2d Cir., 112 F. 2d 888, 889, wherein Judge Learned Hand for the majority stated that each party to a telephone conversation "is

alternately sender and receiver, and it would deny all significance to the privilege created by Sec. 605 to hold that because one party originated the call he had the power to surrender the other's privilege." Certiorari was denied in this case 311 U.S. 653.

The *Polakoff* case was cited and approved in *James* v. *United States*, 98 U.S. App. D. C. 201, 204, 191 F. 2nd 472.

In *Reitmeister* v. *Reitmeister*, 2d Cir., 162 F. 2nd 691, one brother sued another for publication of a telephone conversation in violation of the Communications Act of 1934, Title 47 U.S.C.A. Sec. 605. The complaint was in three counts. The second and third counts were dismissed at the conclusion of plaintiff's case and the jury returned a verdict for the defendant on the first Count which charged the defendant with "Intercepting" and "publishing" a telephone talk between plaintiff and defendants.

The question before the Court was twofold (1) whether the conversation had been "intercepted" and (2) whether the plaintiff had consented to the "publication" of the conversation.

It appears that the defendant in that case "bought a recording machine which would automatically take down what came out of a telephone receiver." The defendant had the telephone conversation of plaintiff and two of defendant's employees recorded. Defendant furnished copies of the recordings to an attorney who published them at a trial. Suit followed. The trial Court charged the jury that the defendant had "intercepted" the talks and would be liable unless the plaintiff had consented to the "publishing". In holding that the talks had been wrongfully "intercepted" the circuit Court, through Judge Learned Hand, said, p. 694:

> * * * Finally, we think that, when Louis (the defendant) recorded the two talks as he did, he "intercepted" messages within the meaning of the section (Title 47 U.S.C.A. Sec. 605). In United States vs. Polakoff (2 Cir., 112F. 2nd 888) the message was taken

> down at the receiver's office in the same way here, and we held that "publishing" it was unlawful. We cannot find that this question has come up again in quite the same form, but the Supreme Court gave our decision at least a limited recognition in Goldstein v. United States (316 U. S. 114, 121), and unless Goldman v. United States (316 U. S. 129) has overruled it, we shall accept it as a valid interpretation of the section (605). We think that Goldman's case has not done so.
>
> * * * The message must be "intercepted" by some mechanical interposition in the transmitting apparatus itself, for the mesage, though sent over the wires, is not immune from disclosure, but only the interjection of an independent receiving device between the lip of the sender and the ear of the receiver. In the case at bar, Louis recorded the talks which passed along the transmitting wire by means of an instrument interjected in that wire; and we cannot see why an existing lead off the main circuit was different from a "tap" into the wire, made ad hoc.

It may be noted that the *Polakoff* and *Reitmeister* cases, above, were decided by a divided Court. However, Judge Hand, as one of the majority, was entirely consistent and persisted in his adherence to the doctrine he announced in each of those cases.

In the *Reitmeister* case, he points out that the doctrines stated in the *Polakoff* Case received "at least a limited recognition in *Goldstein* vs. *U. S.* (316 U. S. 114, 121)", and that the case of *Goldman* vs. *U. S.* 316 U. S. 129, had not overruled it.

Petitioners then claim that, having established that petitioners wires were tapped, the burden was on the prosecution to prove that the information so gained did not "lead" directly or indirectly, to the discovery of any evidence which the Government introduced.

In *U. S.* vs. *Coplon*, (C. C. A. 2), 185 F 2d 629, Judge Hand again restated his views on wire-tapping and virtually challenged this Court to grant certiorari in the case if the Court were wrong. In that case he said (185 F. 2d 636):

> The next question is of the "taps" taken after January 6th. It is of course well-settled law that "wire-tapping" is forbidden by statute,[15] and that evidence obtained by a Federal Officer in violation of law may not be used against the victim of the violation.[16] In U. S. vs. Goldstein [17] we declared what, as we understood the law, was a consequence of "wire-tapping". The accused has the burden of proving that the prosecution has in fact "tapped" his wire; but if he succeeds in doing so, the burden falls upon the prosecution to prove that the information so gained has not "led", directly or indirectly, to the discovery of any of the evidence which it introduces. It is true that on appeal [18] although the Supreme Court approved our decision, it was careful not to affirm this ruling, and, as we said in our opinion, it was not an inevitable gloss upon what the Court has said in Nardone v. United States.[19] However, we thought then, and we still think, that it best carried out the purpose of the language used, and we shall adhere to it, until we are told that it is wrong. The question in the case at bar is therefore whether the prosecution succeeded in proving that the "taps" taken between January 6th and March 4th were not necessary to the production of any of the evidence introduced at the trial.

The Court then held that the telephone "taps" were necessary to the production of evidence, and reversed. See also *Weiss* v. *United States*, 308 U.S. 321.

In view of the challenging words in that opinion, this Court apparently considered that Judge Hand had correctly stated the law. The Government's petition for writ of certiorari was denied. 347 U.S. 920.

In *Nardone* v. *United States*, 302 U.S. 379, 382, the Court said:

> We nevertheless, face the fact that the plain words of Sec. 605 forbid anyone, unless authorized by the

[15] Nardone v. United States, 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307.
[16] Silverthorne Lumber Co., Inc. v. United States, 251 U. S. 385, 40 S. Ct. 183, 64 L. Ed. 319.
[17] 2 Cir. 120 F. 2d 485, 488.
[18] Goldstein v. United States, 316 U.S. 114, 62 S. Ct. 1000, 86 L. Ed. 1312.
[19] 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307.

> sender, to intercept a telephone message, and direct in equally clear language that "*no person*", shall divulge or publish the message or its substance to "*any person*". To recite the contents of the message in testimony before a Court is to divulge the message. The conclusion that the act forbids such testimony seem to us unshaken by the government's arguments

Yet the Government did not stop at this point. Evidence that was "gained by the Government's own wrong" was admitted in evidence. The meetings, acts and conversations of the various defendants and the witness Thoman which directly resulted from the illegal telephone taps were admitted. (Tr. 714, 757-8, 887 and 2069, 1003, 1077, 1125, 1241, 1320-1, 1440-3).

That was in direct contravention of the second *Nardone* Case, 308 U.S. 338, 341:

> Here, as in the Silverthorne Case, the facts improperly obtained do not "become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it" simply because it is used derivatively. 251 US 385, 392, 64 L ed 319, 321, 40 S Ct. 182, 24 ALR 1426.
>
> In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. A sensible way of dealing with such a situation—fair to the intendment of Sec. 605, but fair also to the purpose of the criminal law—ought to be within the reach of experienced trial judges. The burden is, of course, on the accused in the first instance to prove to the trial Court's satisfaction that wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree.

Thus, the details of the meetings of the defendants and Thoman, their words and acts, which *resulted* from illegal telephone calls were inadmissable.

The Opinion Below

In its opinion, App. B, pp. 87-89, the Court of Appeals for the District of Columbia Circuit, said:

> * * * A number of recordings thus obtained were played for the jury over objections. We find no merit in any of these objections.

That was followed by this language:

> It is contended that telephone conversations between Lt. Thoman and appellants were intercepted and recorded, and that the recordings were used in violation of section 605 of the Federal Communications Act, 48 Stat. 1103-4 (1934), 47 U.S.C. Sec. 605 (1952). * * (Here the statute is set out) * * What occurred is that the Lieutenant obtained the telephone recordings now in question through the use of an induction coil apparatus, consisting of a suction cup attached to the telephone receiver, with a wire running from the cup to the Minifon recording device. We need not decide the much discussed question whether this constituted an interception within the meaning of the statute. * * (Here the Court cited cases relied upon by petitioners and respondent) * * We do not reach the question because, assuming interception, no use of the recorded telephone conversations brought about reversible error in this trial. The recordings were not offered or admitted in evidence. The principal use made of them was by Lt. Thoman when, before giving his own testimony of the conversations recorded in this manner, he refreshed his recollection by playing the recordings. However, since he was himself the recipient of the messages, or a participant in the conversations, the connection between any possible violation of the statute and his testimony had "become so attentuated as to dissipate the taint" in its relation to admissibility. Nardone v. United States, 308 U. S. 338, 341. See, also, Sullivan v. United States, 95 U. S. App. D. C. 78, 219

> F. 2d 760. Lt. Thoman's testimony was not itself the product of an illegal interception; he repeated on the stand what he himself had heard. The aid the recordings gave to his recollection did not require the trial court to exclude his knowledge from the jury.

Thus, we see that the appellate Court held that there was no illegal tap of the wires of the accused because the witness Thoman was a party to the conversations and could testify thereto without violation of the Communications Act. That is directly opposed to the law as stated in the *Polakoff* and *Reitmeister* Cases.

The Status of the Law

Thus, we see that in the cases of *Nardone* v. *United States*, 302 U.S. 379, and 308 U.S. 338, this Court first set forth the law respecting wiretapping.

Thereafter, in *United States* v. *Polakoff*, 2 Cir., 112 F. 2d 888, 889 the court held that one who "listened in" on a telephone conversation with the consent of only one party to the conversation intercepted such conversation within the meaning of Tit. 47 U.S.C. 605. Judge Learned Hand, speaking for the Court, held that "anyone intercepts a message to whose intervention as a listener the communicants do not consent; the means he employs can have no importance; it is the breach of privacy that counts" and he observed that it made no difference whether one of the parties consented, "because, no matter what the scope of any such implied consent, it cannot extend to the intervention of prosecuting agents bent upon trapping the 'sender' criminally." Judge Augustus Hand joined the writer of the opinion in his concurrence while Judge Clark dissented, holding that there was no interception and that the listener to the conversation, who was entitled to hear it, might have somebody else use it for him.

Subsequently, this Court decided *Goldman* v. *United States*, 316 U.S. 129, another wire tapping case. At p. 134 of the opinion, this Court undertook to define the word "intercept" and cited *United States* v. *Yee Ping Yong*

(D.C., W.D. Pa.) 26 F. Supp. 69. The facts in the Goldman Case are not like the facts in the Polakoff Case nor the case at bar.

Following the Goldman Case, the Second Circuit had the same question, that arose in the Polakoff Case, before it in *Reitmeister* v. *Reitmeister*, 162 F. 2d) 691, 697. Judge Learned Hand there stated that the Goldman Case had not overruled the Polakoff Case. Judge Chase, concurring on other grounds, stated that he believed that the Goldman Case had overruled the Polakoff Case.

At the present time the law respecting this question is in a state of confusion. The Sixth Circuit in *Flanders* v. *United States*, 222 F. 2d 163, apparently agrees with the dissenting opinion of Judge Clark in the Polakoff Case and with the dissenting opinion of Judge Chase in the Reitmeister Case.

In the District Courts, *United States* v. *Pierce* (N.D. Ohio), 124 F. Supp. 264, *United States* v. *Sullivan* (D.C.), 116 F. Supp. 480, Aff'd ..... U. S. App. D. C. ....., 219 F. 2d 760. *United States* v. *Guller*, (D. C. E. D. Pa.) 101 F. Supp. 176, *United States* v. *Lewis*, (D.C.) 87 F. Supp. 970, rev'd on other grounds, subnom. *Billeci* v. *United States*, 87 U.S. App. D.C. 274, 184 F.2d 394, are opposed to the proposition which petitioners claim to be the law. On the other hand, *United States* v. *Stephenson*, (D.C.) 121 F.Supp. 480 agrees with petitioners. *James* v. *United States*, 98 U.S. App. D.C. 201, 204, 191 F. 2d 472, cites and approves the Polakoff Case.

EXTORTION AS A DEFENSE

5. The petitioners, except Monroe and Prather, urged as one of their theories of defense, to the indictment, that the alleged bribe payments were extorted from them.

In support of their contention, with respect to extortion, the petitioners called to the attention of the trial court the many incidents and occurrences which evidenced and dis-

closed of record that force, coercion, intimidation, oppression, and fear were being engaged to compel and exact monies from them.

In this connection it is urged that error was committed in the denial of petitioners' prayer for instruction numbered 44, which was as follows:

> You are instructed that extortion is:
> "The corrupt taking of money by means of oppression, fear, actual force, force of motives applied to the will, or the compulsion of payments by means of threats of injury to person, property, or reputation, under color or pretense of authority, and, particularly and technically the exaction by an officer of money by color of his office, when no money is due to him at all."
> You are further instructed:
> "Extortion is a complete and full defense. Therefore, if you find that the defendants or any of them were the victims of extortion or if you have reasonable doubt as to whether they were extorted from then you must find the defendants whom you find were extorted not guilty as to all counts of the indictment."

The refusal of the trial court to grant the requested instruction was made one of the points of error urged by the petitioners upon the court below.

The record amply supports the petitioners' contention of extortion, and for purposes of illustration there are hereinafter set forth a few of the excerpts from the record which were cited to the court below. The testimony of the Government's principal witness Lt. Thoman clearly indicated that he was aware of the fact that money was being extorted from gamblers. He testified:

> "Q. Yes; at that time did you realize that money was being extorted from gamblers?
> A. That is correct." (Tr. 1914-1915)[1]

and along the same vein further stated:

[1] Although there was a difference of opinion as to the import of the cited testimony the trial court refused petitioners' request for leave to recall the witness for further questioning on this subject. (Tr. 2771)

> Q. Then from what you said, do I understand or do you want the jury to understand, rather, and the Court that you and Captain Monroe were according to Monroe to agree to try to get some money from gamblers?
>
> A. I told him that I would be agreeable, yes, sir.
>
> . . . . . .
>
> Q. You knew at that time from what Captain Monroe said to you, did you not, that it was his purpose to get you and to get Prather to go together to try to get some money from gamblers, didn't you?
>
> A. Yes, sir. (Tr. 2022-2023)

The evidence clearly revealed that *the scheme of putting 'pressure' on gamblers in order to coerce and compel them into paying money to Thoman* had been in successful operation for six months, during which period none of the petitioners (except Monroe and Prather) had been contacted by Thoman.

The character of the methods used by Thoman and his subordinates and the strategy engaged against the petitioners are such as to leave no question, but that there was planned extortion. For example, Thoman in relating a conversation testified:

> THE WITNESS: Prather said that he had talked to Catfish, was going to talk to Catfish after the game and was going to find out where his number spots, and he would give that information to me *and I could put the heat on him to make him come up with something, come up with some money*, and then he asked me if I had gotten straight with Simpkins. I told him no, that I hadn't. He said, well, when he got me that information about Catfish, well, then, I could go directly to Simpkins to get the payment from him. (Tr. P. 758) (Emphasis added).

There was even an occasion when during a conversation 'jail' was threateningly mentioned in connection with an alleged gambler's son, as follows:

> PRATHER: I will see you. He won't get up off a nickel, that bastard. If there is any way he can avoid it he is just that type. You have got to have him right

over the barrel. He is over the barrel as far as I can see, both of them, probably go to jail.

THOMAN: I think so, too. He doesn't want to see the boy go to jail, I know that—has the money.

PRATHER: He has plenty of money, *I would like to have it. I wouldn't hurt him.** He hates to give up—

THOMAN: Unless they push him up to the wall.[1] (Tr. pp. 841-842)

Thoman admitted knowledge of the use of coercion and intimidation by his subordinates and admitted also his failure to discourage it, as is clear from the following:

"Q. Well, now, for instance, there came a time, did there not, Captain, in which some suggestion was had with respect to arresting the father of an individual to get him to come over, and then there was another time when some individual was mentioned by the name of Catfish, that if something were done to him and that would in turn cause someone else to come, put the heat on them; do you remember that?

A. Yes; there was some conversation but not by me.

Q. You didn't discourage that at any time; you didn't say that wasn't to be done, did you?

A. No, sir; I did not."

There was also an instance when Thoman in conversation with the petitioner King and one John Winston (a co-defendant who was acquitted) asked if they thought pressure was being put on them and they stated "yes". (Tr. p. 779) And Winston specifically stated:

"Winston: Ain't no question in my mind somebody is pushing. * * * *." (Tr. p. 827)

In addition to the foregoing there was an abundance of evidence showing planned and systematic pursuit of the alleged gamblers. The agency through which the pursuit was effected was the then Officer Prather, as is disclosed by one occurrence which concerned the petitioner Anderson,

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* Emphasis supplied.

[1] At page 801 this sentence of the recorded conversation is reported as follows: "No, he ain't going to git it up unless they push him to the wall."

wherein Thoman first mentioned the name of Anderson (Tr. 321, 1661) and thereafter said to Prather:

> "We have got to get hold of Anderson." (Tr. 321, 1929, 1933)

and it was during the above conversation that Prather mentioned the name of the petitioner Curtis Taylor and suggested that:

> "He might be good for a piece of change".

In a related conversation Prather stated in regards to an unidentified alleged gambler, as follows:

> "Prather: * * * I am going down to see if I can catch him and see if the son of a bitch comes up with anything." (Tr. 791, 833)

and in telling Thoman about his efforts to extort money from another alleged gambler, he stated:

> Prather: This fellow Joe—Christ, he worried me to death for about two weeks. Called him—everything I can think of—the day I saw him was on Monday or Tuesday. He told me somebody had been following him. He said, 'Shit, I can't go nowhere. I can't go nowhere. I can't get on the street.' Somebody was following him.
>
> *I figured he was ducking. He don't even answer the phone. His old lady answer the phone.*" (Emphasis supplied)

and in reassuring Thoman of his ceaseless efforts, Prather said:

> "Prather: * * * I will try to get ahold of Wallace tonight. If I can get anything out of him I will call you. * * *" (Tr. 797, 838)

Petitioners are of the sincere opinion that though in the interest of brevity they have not cited exhaustively the acts of extortion, that they nevertheless have sufficiently demonstrated that there was adequate basis for a charge to the jury on extortion as a defense.

Counsel for petitioners urge that the refusal to allow petitioners to defend on the ground of extortion deprived them of their constitutional right to a fair trial, resulting in a failure of due process.

It is our belief that the question here presented is novel, not having previously been determined by this Honorable Court.

Petitioners contend that there was presented a valid theory of defense which the trial court and the Circuit Court of Appeals wrongfully rejected.

Meadows v. *U. S.*, 82 F. 2d. 881; *McAfee* v. *U. S.*, 105 F. 2d. 21; *Calderon* v. *U. S.*, 279 F. 556; *Hendrey* v. *U. S.*, 233 F. 5; *U. S.* v. *Schanerman*, 150 F. 2d. 941.

In the case of *Daniels* v. *U. S.*, 17 F.2d. 339, the defense of extortion was raised in the trial court and urged as a point of error on the appeal. However, the Court of Appeals for the Ninth Circuit held that the evidence did not support appellant's contention.

Petitioners contend that unlike the Daniels case, supra, there was present here sufficient evidence to allow for the submission of the matter of extortion as a fact question for determination by the jury.

The necessary inference flowing from the petitioners' defense of extortion is that there was an offense committed by the government through its agents, which if believed would have compelled the acquittal of those of the petitioners relying on such defense. For it is well settled that the government in a criminal cause may not derive and take advantage of illegal acts committed by its own agents.

In the Daniels case supra, the appellant "took the initiative and was the active proponent of all that was done." In the case at bar the petitioners not only did not take the initiative, but rather were actually and effectively coerced, intimidated and frightened into the payments of the alleged bribes to Thoman, who was using the color and authority of his office to compel and induce the said bribe payments.

LEGALITY OF CONVICTION OF AIDER AND ABETTOR WHERE KNOWN PRINCIPAL IS ACQUITTED

6. In addition to the questions which are presented affecting all or most of the petitioners commonly the proposition here urged concerns the petitioner Burnie King alone.

The petitioner Burnie King was acquitted of all charges against him except as to count 4 of the indictment. He was charged in the said count 4 together with petitioners Anderson and Prather, and one John Winston, who was acquitted by the jury on all counts of the indictment which affected him (Winston), with having on May 23, 1954, given a bribe to Lt. Todd O. Thoman, Jr.

The theory of the prosecution was that King and the others named aided and abetted the said John Winston in the commission of the offense charged in the aforementioned count 4. The Court charged the jury fully thereon as follows:

> "In count 4 the defendants Anderson, Winston, Prather and King are charged with giving Thoman $1000 on or about May 23, 1954. My recollection is that Captain Thoman testified that Winston and King were personally present at the time of the alleged offense and that Winston gave Thoman the money after King told him to do so. *The contention of the Government is that King aided and abetted Winston and that Anderson and Prather although not present are chargeable in count 4 under the conniving and aiding and abetting law.*[*]

and the Court in the following language instructed the jury to find the aider and abettor not guilty if they found the principal not guilty:

> "*The Government maintains that Monroe and Prather each advised, incited or connived at the af-*

[*] Emphasis supplied.

*fense charged in Count 2 or aided or abetted Anderson with respect thereto, and hence that they are principal offenders along with Anderson.** (Tr. 3022)

*. . . If you have a reasonable doubt that Anderson gave Thoman said $500, or if you believe that he did not do so, then you would find Anderson not guilty, and in that event naturally you would find Monroe and Prather also not guilty as to Count 2. In other words if you find the offense charged in count 2 was not committed by Anderson, then necessarily Monroe and Prather could not have connived at or aided in its commission."**

and then specifically instructed the jury that the same principle they had been instructed to apply to count 2 was also be applied to other counts of the indictment including count 4, as follows:

". . . The principles outlined to you respecting Count 2 apply also to certain other counts which charge the corrupt giving of money to Captain Thoman, said counts being 3, 4, 5, 6, 7, 9, 12 and 16. As to each of these counts, 3, 4, 5, 6, 7, 9, 12 and 16 you are to deliberate in the same way I have indicated regarding Count 2. You are to consider each defendant separately in each count, and as to each count you are to first deliberate on the defendant named therein as to whom you may find there is evidence testimony tending to show that he performed the alleged physical act of giving money to Thoman.

Now without going into detail, I will touch briefly on these counts, that is, 3, 4, 5, 6, 7, 9, 12 and 16.

In count 3 and in count 7 the same allegation is made against Monroe, Prather and Anderson as is made in count 2, the only difference being that in count 3 the date of the alleged offense is given as on or about May 20, 1954 and in count 7, is given as on or about July 3, 1954. My recollection is that Captain Thoman testified that Anderson was personally present at the time and place of the offense alleged in count 3 and count 7. The contention of the Government is that Monroe and Prather, although not then present, are chargeable in count 3 and 7 under the conniving, aiding and abetting law already explained." (Tr. 3023, 3024).

Petitioner King urges that the verdict of guilty returned against him on count 4 of the indictment was improper, and that as a matter of law it may not stand inasmuch as the known principal as well as the alleged aiders and abettors with whom he was jointly indicted and tried were acquitted of the offense.

The court below affirmed the conviction of petitioner King, but without specific treatment of the question or comment thereon. Consequently, we are without knowledge as to the basis of the court's holding on this point.

The law is legion for the proposition that an aider and abettor may not be convicted where there has been an acquittal of the known principal. Admittedly there are decisions which sustain the conviction of an aider and abettor where the principal is unknown. And there are some cases which allow for the conviction of an aider and abettor even though the person charged as the principal has been acquitted. This, of course, is permitted on the theory that the criminal act was committed, but that the charged principal was not the one who committed it. Therefore, the rationale is the same as that applied by the courts which follow the unknown principal theory.

In the case at bar no question of unknown principal arises for it is conceded that if the criminal act was committed Winston did it.

It is urged upon this Honorable Court that in light of the acquittal of the known principal, the effect in law is that the criminal offense has not been committed. Especially is this true where as here the jury was not requested to return a special verdict and did not do so of its own accord.

In *Morgan* v. *United States*, 159 F2d. 85, at page 87, the Court speaking through Circuit Judge Huxman, stated:

> "One cannot aid and abet in the commission of a crime unless there is another who has committed the offense. In other words, one cannot be an aider and abettor of himself in the commission of an offense. Obviously, therefore, one cannot be found guilty under a

> charge of aiding and abetting in the commission of an offense unless there is satisfactory evidence not only of his participation but also that another for whom he was acting was connected with the offense."

and in *Karrell* v. *United States*, 181 F.2d. 981 at page 985, Circuit Judge Stephens, on behalf of the Court said:

> "The law requires a guilty principal before the aider and abettor can be punished."

and in *Yenkichi Ito* v. *United States*, 64 F.2d. 73 at page 75, Circuit Judge Wilbur, on behalf of the Court said:

> "In order for one person to be held criminally responsible as an aider and abettor in the commission of an act by another, as is sought to be done here, the act committed by this other person must constitute a crime against the Government which prosecutes the charge."

and in *United States* v. *Horton*, 180 F.2d. 427, at page 430, Chief Judge Major speaking for the Court said:

> "Of course, a defendant may be tried and convicted as a principal upon proof that he aided and abetted the commission of a crime, but in the instant case the proof does not support a conviction on the accessory theory."

and thereafter citing verbatim the language of the *Morgan* case, supra. See also *Von Patzoll* v. *U. S.*, 163 F.2d. 216; *Beauchamp* v. *U. S.*, 154 F.2d. 413.

Appellant urges that the verdict by the jury as to Winston, renders whatever acts, if any, committed by him to be of non penal character. In *Manning* v. *Biddle*, 14 F.2d. 518, the Court stated at page 519:

> "Such being the nonpenal character of the acts charged against Eckert, it is obvious that the mere aiding and abetting of the acts by another could not be punishable. Conceding that a person may be guilty as an aider and abettor and the person whom he is charged with aiding and abetting may not be guilty, for the reason that such accused is not the person who committed the crime, still it is an essential thing that

> a crime was actually committed. Without that, certainly the statute does not penalize an aider and abettor of acts that are not unlawful.

A fact situation somewhat similar to the one at bar was considered by the Court of Appeals for the District of Columbia Circuit in the case of *Plummer* v. *United States*, 189 F.2d. 19, and Judge Prettyman, speaking for the Court at page 22 stated the following:

> "As a matter of fact, he himself did not make the bet. He acted an an intermediary, at the request of a customer, between the customer and a person who would take a bet. And, when that person was not present, the waiter said no bets could be placed. If the waiter had set up and kept the table for the purpose of gaming, why would he have told a prospect that there was no one there to take a bet? As a matter of fact, at no point either in the trial court or in this Court has the Government claimed Plummer set up or kept the luncheon table as a gaming table for the purpose of gaming. Moreover, the waiter was not acting as an aider and abettor or accomplice to Kopel in the gaming table charge, because Kopel was innocent.

and in considering the theory of the prosecution which had urged the applicant's guilt as an aider and abettor to a principal who had been acquitted the Court at page 23 said:

> "If the Court had accepted the prosecutor's theory as to Count 1, a judgment of acquittal would necessarily have been entered as to Plummer on that count, because Kopel, the alleged principal, was acquitted."

Petitioner urges that upon the acquittal of Winston, the Court should have granted his motion for judgment of acquittal and failure to have done so constitutes reversible error, moreover, it is urged that the verdict rendered may not stand for the reason that it is patently contrary to the Court's instruction. (*Sparf* v. *United States*, 156 U.S. 51)

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATUTES INVOLVED

Title 18, Section 371, United States Code:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 22, Section 704, District of Columbia Code (1951):

"Whosoever corruptly, directly or indirectly gives any money, or other bribe, present, reward, promise, contract, obligation or security for the payment of any money, present, reward, or thing of value to any ministerial, administrative, executive, or judicial officer of the District of Columbia or any employee or other person acting in any capacity for the District of Columbia, or any agency thereof, either before or after he is qualified, with intent to influence his action on any matter which is then pending, or may by law come or be brought before him in his official capacity, or to cause him to execute any of the powers in him vested, or to perform any duties of him required, with partiality or favor, or otherwise than is required by law, * * * shall be deemed guilty of bribery and upon conviction thereof shall be punished by imprisonment for a term not less than six months nor more than five years."

Title 47, Section 605, United States Code:

"* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit

or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto."

RULES OF COURT

Federal Rules of Criminal Procedure

RULE 8.

JOINDER OF OFFENSES AND OF DEFENDANTS

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting on offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

RULE 16

"Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects,

obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just."

RULE 17 (c)

"A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12683, JOHN B. MONROE, APPELLANT, v. UNITED STATES OF AMERICA, APPELLEE; No. 12684, GEORGE C. PRATHER, APPELLANT, v. UNITED STATES OF AMERICA, APPELLEE; No. 12685, ROGER W. SIMKINS, APPELLANT, v. UNITED STATES OF AMERICA, APPELLEE; No. 12686, CURTIS M. TAYLOR, APPELLANT, v. UNITED STATES OF AMERICA, APPELLEE; No. 12687, ALBERT H. SMITH, APPELLANT, v. UNITED STATES OF AMERICA, APPELLEE; No. 12689, CHARLES ANDERSON, APPELLANT, v. UNITED STATES OF AMERICA, APPELLEE; No. 12690, BURNIE KING, APPELLANT, v. UNITED STATES OF AMERICA, APPELLEE.

Appeals from the United States District Court
for the District of Columbia

Decided April 30, 1956

Before WILBUR K. MILLER, FAHY and DANAHER, Circuit Judges.

FAHY, *Circuit Judge:* These are appeals from convictions under 62 Stat. 701 (1948), 18 U.S.C. § 371 (1952), for conspiring to violate § 22-704, D. C. Code (1951) by bribery, and from convictions of bribery itself. The conspiracy and bribery were directed toward influencing the official conduct of Lieutenant Todd O. Thoman, Jr., of the Metropolitan Police Department, to perform his duties with partiality and favor, and otherwise than as required by law in the enforcement of the gambling laws of the District of Columbia. Lieutenant Thoman was entirely innocent of wrongdoing. In fact he uncovered the allegedly criminal conduct by permitting himself seemingly to participate therein, while at the same time reporting the unfolding events to his superior officers and assembling evidence in preparation for arrests.

The indictment contains nineteen counts. Count one covers the conspiracy. The eighteen other counts cover specific acts of bribery. All appellants, together with John Winston, who was acquitted, were charged in the conspiracy count and were also charged with bribery in one or more other counts.

Two appellants, Monroe and Prather, were members of the Metropolitan Police Department. They are the only ones who were convicted of conspiracy. Monroe was also convicted of three charges of bribery.[1] Prather was acquitted of bribery, so that his appeal brings in question only his conviction with Monroe of conspiracy. Appellant Anderson was convicted of three charges of bribery and acquitted

[1] He was acquitted of three bribery counts.

of three; King was convicted of one charge of bribery and acquitted of seven; Taylor was convicted of one and acquitted of one; Simkins was convicted of four and acquitted of one; and Smith was convicted of one.

Monroe was sentenced under the conspiracy count to imprisonment for twenty months to five years and to pay a fine of $1,000. He was also sentenced for sixteen months to four years for each bribery conviction, these sentences to run concurrently with one another and with his conspiracy sentence. Since the latter is for a longer time than his concurrent sentences for bribery, and since the conspiracy and bribery charges are intimately related, the judgment should be affirmed if no reversible error impairs the conspiracy conviction.[2] Since Prather was convicted only of conspiracy we are also required to review only that judgment as to him.

Monroe and Prather contend that there was a fatal variance between count one, the conspiracy count, and the proof, in that the conspiracy count charged but one conspiracy whereas the proof showed several. The same contention is made by all other appellants, but of course it is not available to them because they were acquitted of conspiracy. And insofar as Monroe and Prather are concerned we find no reversible error due to the alleged variance, assuming *arguendo* its existence. In *Berger* v. *United States*, 295 U. S. 78, 82, the Supreme Court held that the legal effect of such a variance depends upon whether it has substantially injured the defendant:

> "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused."

[2] Hirabayashi v. United States, 320 U.S. 81, 85; United States v. Trenton Potteries, 273 U.S. 392, 402; Pierce v. United States, 252 U.S. 239, 252-3; cf. Bramblett v. United States, — U.S. App. D.C. —, — F. 2d —, cert. denied, — U.S. —. Compare Nelms v. United States, 94 U.S. App. D.C. 267, 215 F. 2d 678; Washington v. United States, — U.S. App. D.C. —, — F. 2d —.

The Court said that the reasons for the general rule requiring correspondence between allegations and proof are that the accused be definitely informed of the charges so as to enable him to present his defense without being taken by surprise by the evidence, and that he be protected against another prosecution for the same offense.

Applying these tests to the conspiracy convictions of Monroe and Prather it seems altogether clear their substantial rights were not affected. These two officers were the main participants in the undertaking to secure the bribery of Lt. Thoman. There was testimony that Monroe first approached Thoman about obtaining protection money from gamblers, and that Monroe brought Prather into the scheme with a view of both himself and Prather joining Thoman in carrying out a widespread plan of obtaining such money. After Monroe's initiation of the project, Prather, in accordance with Monroe's plan and at his instigation, personally spoke to Thoman about it. At an arranged meeting with Prather protection money was passed to Thoman. Thoman reported this to his superiors, and with them to the United States Attorney. There was abundant additional evidence of the conspiratorial activities of Monroe and Prather, including the passage to Thoman of names, addresses, and telephone and tag numbers of gamblers, and with contacts, in furtherance of the conspiracy, between Thoman and appellants Anderson, Simkins, Taylor, and King. The conspiracy of Monroe and Prather embraced these others; and if any of the latter considered individually could not be said to have participated in as broad an operation as did Monroe and Prather, this did not significantly affect the fairness of the trial of these two for conspiracy. They were a part in some way of all that occurred, though others might not have been. Therefore it cannot be said that proof of the whole operated unfairly to their prejudice, or came as a surprise to them. Furthermore, the possibility of prejudice in later defending on the ground of their present convictions, should they again be

prosecuted for any of the count one transactions used to obtain these convictions, is too fanciful to be used as a basis for setting aside such convictions. The Supreme Court met a similar problem in *Berger* by stating, "certainly the fact that the proof disclosed two conspiracies instead of one, each within the words of the indictment, cannot prejudice his defense of former acquittal of the one or former conviction of the other, if he should again be prosecuted." 295 U. S. at 83. The reason this is so here, as well as in *Berger*, is that, assuming the indictment itself does not disclose all the conduct to which the evidence might be directed in proving the charge made, nevertheless, in event of an attempted second prosecution, resort could be had to the record of the evidence, or even to parole evidence if necessary. See *Dunbar* v. *United States*, 156 U. S. 185, 191; *Bartell* v. *United States*, 227 U.S. 427, 433; *Kotteakos* v. *United States*, 328 U. S. 750, 780 (dissenting opinion); *United States* v. *Busch*, 64 F. 2d 27 (2d Cir.), *cert. denied*, 290 U. S. 627; 48 Harv. L. Rev. 515, 516.

Appellants' argument respecting the alleged variance relies heavily upon the opinion of Mr. Justice Rutledge for the Supreme Court in *Kotteakos* v. *United States*, *supra*, where substantial prejudice was found to have resulted from a conviction of a single conspiracy on evidence conceded by the Government to have proved some eight or more different conspiracies. The indictment named thirty-two defendants of whom nineteen were tried. The cases of thirteen went to the jury and seven were found guilty. The key figure in that case, however, the one common to the total scheme,[3] had pleaded guilty. He was not in the case as it was decided by the Supreme Court. The Court held that the variance was prejudicial. But the *Berger* case was not disapproved. It was distinguished on factual differences between the two cases. The *Kotteakos* opinion is a treatise upon the subject of when, and when not, error

[3] The conspiracy charged was to obtain loans under the National Housing Act for purposes outside its terms.

should lead to reversal within the terms of section 269 of the Judicial Code, 40 Stat. 1181 (1919), 28 U.S.C. § 391 (1940), which requires an appellate court to give judgment "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." This principle is now embodied in Rules 51 and 52(a), Fed. R. Crim. P. But the finding by the Supreme Court of prejudicial error in *Kotteakos* cannot be transplanted to the case at bar. Not only in *Kotteakos* was the "hub" man out of the case when it reached the appellate courts, while here the two "hub" men are the only ones now involved in the question, but, as we have outlined, the scheme of Monroe and Prather extended to all that was proved respecting the conspiracy. They were not surprised, nor were their substantial rights otherwise prejudiced by the alleged variance.

Lt. Thoman equipped himself with a Minifon to aid in the investigation. Through this device numerous conversations he held with various appellants were recorded on wires. The spools upon which the recordings were made were turned over to Lt. Thoman's superiors in the Police Department. A number of recordings thus obtained were played for the jury over objections. We find no merit in any of these objections. Appellants contend, in the first place, that this evidence was inadmissible under the best evidence rule. They say that Lt. Thoman's testimony was the best evidence as to the conversations. But courts have consistently admitted such recordings in evidence. *Schuyler* v. *United Air Lines,* 94 F. Supp. 472 (M.D. Pa.), *aff'd,* 188 F. 2d 968 (3d Cir.); *Commonwealth* v. *Clark,* 123 Pa. Super. 277, 187 Atl. 237; *State* v. *Slater,* 36 Wash. 2d 357, 218 P. 2d 329; cases cited in Annot., 168 A.L.R. 927; *Burgman v. United States,* 88 U.S. App. D.C. 184, 188 F. 2d 637, *cert. denied,* 342 U. S. 838; *Gillars* v. *United States,* 87 U. S. App. D.C. 16, 27, 182, F. 2d 962, 973; *cf. People* v. *Hayes,* 21 Cal. App. 2d 320, 71 P. 2d 321. Their competency as evidence derives from their reliability as a means of arriving at the truth. Of course, there must be evidence introduced from

which it can be inferred that the recordings are accurate. Lt. Thoman provided such evidence by testifying as to the operation of the recording device, his method of operating it, the accuracy of the recordings, and the identities of the persons speaking.

Appellants also argue that particular recordings, because inaudible at times or incomplete, gave the jury only a part of what they purported to represent. They cite *Hunter* v. *Hunter*, 169 Pa. Super. 498, 83 A. 2d 401; *People* v. *Stephens*, 117 Cal. App. 2d 653, 256 P. 2d 1033; and *William* v. *State*, 39 Ala. 532. No all embracing rule on admissibility should flow from partial inaudibility or incompleteness. The Court of Appeals for the Third Circuit, in *United States* v. *Schanerman*, 150 F. 2d 941, 944, has said that partial inaudibility is no more valid reasons for excluding recorded conversations than the failure of a personal witness to overhear all of a conversation should exclude his testimony as to those parts he did hear. Unless the unintelligible portions are so substantial as to render the recording as a whole untrustworthy the recording is admissible, and the decision should be left to the sound discretion of the trial judge. This is especially so when the witness who heard the statements recorded also testifies, so that the recordings give independent support to his testimony. *Wright* v. *State*, —— Ala. ——, 79 So. 2d 66; *State* v. *Slater*, *supra*. Here the trial judge followed the correct procedure of having the records played out of the presence of the jury so that she could rule on any objections raised by defendants before the jury heard the recordings. See *Wright* v. *State*, *supra* at 73. We have no basis for finding an abuse of discretion by the District Court in not deciding that the recordings were too incoherent, inaudible or partial to be admitted.

Appellants say the recordings were not admissible as corroborative of Thoman's primary evidence because the latter had not been impeached. They point to the rule that prior consistent statements of a witness are not admissible to corroborate his testimony until he has been impeached,

citing *Goins* v. *United States*, 99 F. 2d 147, 150 (4th Cir.). But we do not rest the admissibility of the recordings upon a theory they constitute corroborative evidence, as is sometimes done. We think, as above indicated, that they are admissible as independent evidence of what occurred.

Various motions were filed for inspection of Government documents and recordings and to "play, hear, record, inspect and/or to copy" the recorded material. These motions were all denied. It is doubtful that the Minifon recordings could qualify for discovery and inspection under Rule 16, Fed. R. Crim. P., which applies to "* * * documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process * * *." The recordings are analogous to copies of confessions made by defendants to the police, which several courts have held do not fall within Rule 16. *Shores* v. *United States*, 174 F.2d 838 (8th Cir.); *United States* v. *Black*, 6 F.R.D. 270 (N.D.Ind.); *cf. United States* v. *Chandler*, 7 F.R.D. 365 (D. Mass), *aff'd*, 171 F.2d 921 (1st Cir.), *cert. denied*, 336 U.S. 918. See, also, Comment, "Pre-Trial Disclosure in Criminal Cases," 60 Yale L.J. 626, 628. However, Rule 17(c), which also permits the court to order pre-trial inspection, is broader in scope than Rule 16, extending to "books, papers, documents or other objects" designated in a subpeona, and since some subpoenas were served by defendants in the effort to obtain discovery we think their various motions and attempts should fairly be construed as invoking Rule 17(c). The recordings were evidentiary, and therefore under the interpretation of Rule 17(c) adopted by the Supreme Court and already followed by this court, the trial court in its discretion could have required pre-trial production. *Bowman Dairy Co.* v. *United States*, 341 U.S. 214; *Fryer* v. *United States*, 93 U.S. App. D.C. 34, 207 F.2d 134, *cert. denied*, 346 U.S. 885. However, the court did not abuse its discretion in denying appellants' requests, because the accused had already been accorded

by the Government an opportunity to inspect the recordings. The United States offered to play them for the defendants and their counsel; and before the court denied the motions seeking specifically permission to inspect the recordings they had in fact been played over a period of three days in conformity with the Government's offer. Counsel for defendants in related cases attended the playing for part of the time. Appellants and their counsel could have done so.

Appellants argue that they were entitled to hear the original recordings, not the copies which the Government played. But the Government represented to the court that the original recordings were too fragile to be used for discovery playing and filed an affidavit in which the accuracy of the reproduction from the originals was certified. The truth of this affidavit is not brought in question. Consequently, it was well within the discretion of the trial court to decline to order inspection of the originals. And the argument now made that appellants were entitled to make stenographic transcripts of the recordings, or in lieu thereof to be furnished copies of transcripts made by the Government, was not pressed upon the trial court in any of the motions for pre-trial discovery or production to which we have referred. Nor does it appear that permission was aksed of the Government, and denied, to make a transcript at the time the recordings were played for the benefit of the defendants. Consequently, appellants cannot now complain that they were deprived of any alleged right to have a transcript.

It is contended that telephone conversations between Lt. Thoman and appellants were intercepted and recorded, and that the recordings were used in violation of section 605 of the Federal Communications Act, 48 Stat. 1103-4 (1934), 47 U.S.C. § 605 (1952). This provision reads in pertinent part as follows:

> "* * * no person not being authorized by the sender shall intercept any communication and divulge or pub-

> lish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * * and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: * * *."

What occurred is that the Lieutenant obtained the telephone recordings now in question through the use of an induction coil apparatus, consisting of a suction cup attached to the telephone receiver, with a wire running from the cup to the Minifon recording device. We need not decide the much discussed question whether this constituted an interception within the meaning of the statute. See *United States* v. *Polakoff*, 112 F.2d 888 (2d Cir.) *cert. denied*, 311 U.S. 653; *Reitmeister* v. *Reitmeister*, 162 F.2d 691 (2d Cir.); *Flanders* v. *United States*, 222 F.2d 163 (6th Cir.); *United States* v. *Yee Ping Jong*, 26 F. Supp. 69 (W.D. Pa.); *United States* v. *Lewis*, 87 F. Supp. 970 (D.D.C.), *rev'd on other grounds sub nom. Billeci* v. *United States*, 87 U.S. App. D.C. 274, 184 F.2d 394; *United States* v. *Sullivan*, 116 F. Supp. 480 (D.D.C.), *aff'd*, 95 U.S. App. D.C. 78, 219 F.2d 760; *United States* v. *Stephenson*, 121 F. Supp. 274 (D.D.C.), *appeal dismissed*, — U.S. App. D.C. —, 223 F.2d 336; and our own case of *James* v. *United States*, 89 U.S. App. D.C. 201, 191 F.2d 472, *cert. denied*, 342 U.S. 948. All these decisions must be considered with *Goldman* v. *United States*, 316 U.S. 129. We do not reach the question because, assuming interception, no use of the recorded telephone conversations brought about reversible error in this trial. The recordings were not offered or admitted in evidence. The principal use made of them was by Lt. Thoman when, before giving his own testimony of the conversations re-

corded in this manner, he refreshed his recollection by playing the recordings. However, since he was himself the recipient of the messages, or a participant in the conversations, the connection between any possible violation of the statute and his testimony had "become so attenuated as to dissipate the taint" in its relation to admissibility. *Nardone* v. *United States*, 308 U.S. 338, 341. See, also, *Sullivan* v. *United States*, 95 U.S. App. D.C. 78, 219 F.2d 760. Lt. Thoman's testimony was not itself the product of an illegal interception; he repeated on the stand what he himself had heard. The aid the recordings gave to his recollection did not require the trial court to exclude his knowledge from the jury.

There is an additional contention that the so-called interceptions had been divulged to police officers and others in the Government's preparation for trial. But Lt. Thoman transmitted the same information legally, as the product of what he himself heard. See *Nardone* v. *United States, supra* at 341; *United States* v. *Goldstein*, 120 F. 2d 485, 487 (2d Cir.), *aff'd*, 316 U.S. 114. Thus again it cannot be said that any part of the Government's case was significantly produced by the allegedly illicit telephone interceptions.

The remaining point requiring discussion is the contention of appellants that the conviction of each must be reversed because each was prejudiced in his defense by the trial of all substantive charges together, and with the conspiracy charge. Except for the appellant Smith, however, no appellant reserved this point clearly on the record either before, during, or after trial. The motion of appellants before trial attacking the indictment itself for alleged misjoinder went to the validity of the indictment, not to the question of advisability of separate trials. Since the offenses charged were of the same or similar character, and the defendants were alleged to have participated in the same conspiracy, the joinder of offenses and defendants in the indictment itself was

permissible under Rule 8, Fed. R. Crim. P. *Robinson* v. *United States*, 93 U.S. App. D.C. 347, 210 F.2d 29; *Scheve* v. *United States*, 87 U.S. App. D.C. 289, 184 F.2d 695; *cf. Spear* v. *United States*, 216 F.2d 185 (4th Cir.). Appellants also perisistently contended that the proof showed more than one conspiracy, whereas only one was charged, and that this variance was prejudicial. We have disposed of that branch of the case in finding no prejudice caused Monroe and Prather by the alleged variance, and since the other appellants were acquitted of conspiracy any question in that regard is eliminated as to them. The present contention is based, not on a variance between indictment and proof, but on the trial at one time of the conspiracy count and the substantive counts of bribery. If appellants wished to be tried separately on these charges they were under strong obligation explicitly so to urge in the District Court by motion under Rule 14, Fed. R. Crim. P. See *Dunaway* v. *United States*, 92 U.S. App. D.C. 299, 205 F.2d 23; *United States* v. *Northeast Texas Chapter*, 181 F.2d 30 (5th Cir.). This was not done except in the case of Smith. The others appear to have been willing to leave their fate to a trial including the conspiracy and substantive counts. Assuming, however, that the accused reserved the matter for our review, we find no error in the failure of the District Court to grant relief under Rule 14. We note initially that the problem is narrowed by the acquittal of all, except Monroe and Prather, of conspiracy. The gravest danger of prejudice was that some might be convicted of conspiracy through attribution to them of evidence applicable only to others. *Blumenthal* v. *United States*, 322 U.S. 539, 559. All except Monroe and Prather escaped this danger by their acquittal of conspiracy; and, as we have already seen, in connection with the discussion of the alleged variance, the evidence so clearly established that Monroe and Prather were intimately involved in the whole of what occurred, and the evidence of their partici-

pation in the conspiracy was so complete, that we cannot hold that prejudicial error afflicted their convictions of conspiracy due to the trial of others with them.

The validity of Monroe's conviction of conspiracy renders it unnecessary to consider his conviction of bribery, see note 2 *supra*, and Prather was acquitted of all substantive charges of bribery. Hence, the question remaining is whether the other appellants were prejudiced by being tried for conspiracy with the substantive offenses, and together on the substantive offenses, of which alone they were convicted. This involves a matter of judgment to be exercised now in light of developments at the trial, keeping in mind that the decision was for the sound discretion of the trial judge. *Dunaway* v. *United States*, *supra*. The jury, as we have seen, acquitted Prather entirely of bribery, Anderson was convicted of three of six charges of bribery, King was convicted of only one of eight charges of bribery, Taylor was convicted of one charge and acquitted of one, and Simkins was convicted of four and acquitted of one.[4] Thus, the jury was selective. This at least to some degree indicates that the jury returned verdicts only upon the basis of evidence relevant to each count and each defendant. *Finnegan* v. *United States*, 204 F.2d 105, 109-10 (8th Cir.). The judge specifically warned the jury in this regard, saying,

> "that with respect to the substantive counts of the indictment you must determine the guilt or innocence of each defendant charged thereunder solely on the evidence produced with respect to that defendant.
> * * *
> "Now, I shall not refer in detail to every one of the defendants, but that same rule applies to each and all of the defendants with respect to these substantive counts, and I have just mentioned this particularly so that it would be clear to you.
> "You are told that testimony which has been admitted only to apply as to a specified defendant may

[4] Smith was convicted of the single bribery charge which was brought against him.

only be considered by you as to that defendant and none other."

Furthermore, the court charged in considerable detail as to the separate substantive counts. She referred to the dates and the amounts alleged to have been paid on those dates for protection, in such a manner that it is clear the jury understood just how they should go about determining guilt or innocence with respect to each substantive charge. Judging the situation after the trial, therefore, as we must do, knowing that all appellants except Monroe and Prather were acquitted of conspiracy, and considering the evidence supporting each separate substantive charge which resulted in a verdict of guilty, together with the court's full, fair and careful charge, we may not speculate that the trial actually led to any conviction which would not have occurred except for the consolidated trial. *Dunaway* v. *United States*, *supra*. While the danger of which the Supreme Court warned in *Blumenthal* v. *United States*, *supra* at 559, that evidence might be transferred to one to whom it does not apply, must be constantly in mind in permitting and in reviewing joint trials—a danger "likely to arise in any conspiracy trial and more likely to occur as the number of persons charged together increases" — we think the conclusion reached in *Blumenthal* that prejudice did not occur should also be reached here.

We have examined other contentions of appellants but do not find it necessary to discuss them. None requires reversal. They include the claim that the District Court abused its discretion in refusing appellants' request that Lt. Thoman be required to give a typewriting demonstration when being cross-examined about his testimony regarding his typewritten notes; the contention that evidence of other offenses than those on trial was erroneously admitted; and the contention that the court erred in refusing to instruct the jury on the subject of extortion.

Affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12683, JOHN B. MONROE, APPELLANT, v. UNITED STATES OF AMERICA, APPELLEE; No. 12684, GEORGE C. PRATHER, APPELLANT, v. UNITED STATES OF AMERICA, APPELLEE; No. 12685, ROGER W. SIMKINS, APPELLANT, v. UNITED STATES OF AMERICA, APPELLEE; No. 12686, CURTIS M. TAYLOR, APPELLANT, v. UNITED STATES OF AMERICA, APPELLEE; No. 12687, ALBERT H. SMITH, APPELLANT, v. UNITED STATES OF AMERICA, APPELLEE; No. 12689, CHARLES ANDERSON, APPELLANT, v. UNITED STATES OF AMERICA, APPELLEE; No. 12690, BURNIE KING, APPELLANT, v. UNITED STATES OF AMERICA, APPELLEE.

On Petitions for Rehearing

Filed June 12, 1956

Before WILBUR K. MILLER, FAHY, and DANAHER, Circuit Judges.

FAHY, *Circuit Judge:* In the opinion rendered April 30, 1956, we stated that appellants' argument that they were entitled to make stenographic transcripts of the recordings or to be furnished copies of the Government's transcripts was not pressed upon the trial court in the motions to which we referred. After issuance of our opinion appellants supplemented the record in this court by including a transcript of certain proceedings prior to trial which had not been before us when we decided the case. In those proceedings appellants did press for the right to make stenographic transcripts of the recordings or to be furnished copies of transcripts by the Government. Never-

theless, aside from appellants' failure earlier to bring that matter before us in the record on appeal, we conclude that the refusal to grant the request was not reversible error. In addition to the earlier opportunity, referred to in our opinion, to hear the recordings, those parts of the recordings actually admitted in evidence were played again out of the presence of the jury but with counsel for appellants present. This was done to aid the court in ruling upon their admissibility. This additional opportunity of appellants to acquaint themselves with the contents of the recordings actually used—during a trial which lasted some weeks—with no request or denial then of an opportunity to transcribe them, supports our conclusion that the refusal complained of was not such an abuse of discretion as to require a new trial of these cases. We add that appellants point to no particular prejudice which grew out of the refusal.

The petitions for rehearing are denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 237

ALBERT H. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

No. 246

JOHN B. MONROE, GEORGE C. PRATHER, ROGER W. SIMKINS, CURTIS M. TAYLOR, CHARLES ANDERSON, BURNIE KING, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals (Pet. No. 237, pp. 20–36; Pet. No. 246, pp. 79–94; J. A. 86–100; 105–106)[1] are not yet reported.

[1] "J. A." refers to the joint appendix in the Court of Appeals. The joint appendix and the transcript of the trial proceedings form the record filed with this Court. The transcript will be designated by the letter "R." throughout this brief.

JURISDICTION

The judgment of the Court of Appeals was entered on April 30, 1956 (J. A. 102). Petitions for rehearing were denied on June 12, 1956 (J. A. 106). The petition for a writ of certiorari in No. 237 was filed on July 6, 1956; the petition in No. 246, on July 11, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

STATUTES AND RULES INVOLVED

18 U. S. C. 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

49 Stat. 1143, 22 D. C. Code 704 (1951), provides in pertinent part:

> Whosoever corruptly, directly or indirectly, gives any money, or other bribe, present, reward, promise, contract, obligation, or security for the payment of any money, present, reward, or thing of value to any ministerial, administrative, executive, or judicial officer of the District of Columbia or any employee or other person acting in any capacity for the District of Columbia, or any agency thereof, either before or after he is qualified, with intent to influence his action on any matter which is then pending, or may by law come or be brought before him in his official capacity, or

> to cause him to execute any of the powers in him vested, or to perform any duties of him required, with partiality or favor, or otherwise than is required by law, * * * shall be deemed guilty of bribery and upon conviction thereof shall be punished by imprisonment for a term not less than six months nor more than five years.

Section 605 of the Communications Act of 1934, 48 Stat. 1103, 47 U. S. C. 605, provides in pertinent part:

> * * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto.

Rule 8 of the Federal Rules of Criminal Procedure provides:

> (a) *Joinder of Offenses.*—Two or more offenses may be charged in the same indictment

or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) *Joinder of Defendants.*—Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

QUESTIONS PRESENTED

1. Whether there was in this case a prejudicial variance between the conspiracy count of the indictment—alleging a single conspiracy to bribe a police officer—and the proof; and, if so, whether there was a prejudicial misjoinder of separate substantive charges of bribery.

2. Whether the trial court abused its discretion in denying petitioners' request for pre-trial inspection and stenographic transcripts of the original wire recordings of conversations between the prosecution's chief witness and various petitioners in view of the fact that the court knew the Government had already invited petitioners and their counsel to a pre-trial playing of transcriptions of the recordings.

3. Whether petitioner Smith was prejudiced by the admission into evidence of a magnetically recorded

conversation between him and a police officer, which did not reveal the entire conversation due to the fact that the spool of recording wire ran out during the conversation, the police officer having testified in full about the conversation on the stand.

4. Whether the testimony of Lt. Thoman, as to the meetings with petitioners where the offenses charged took place, was rendered inadmissible, under "the fruit of the poisoned tree" doctrine, because he recorded the telephone conversations in which the meetings were arranged.

5. Whether there was error in the refusal of the trial judge to give an instruction to the jury on extortion as a defense when there was no evidence of extortion presented at the trial.

6. Whether the conviction of petitioner King can stand in view of the jury finding of not guilty in the case of Winston with whom King was jointly named in the indictment as having given a police officer a bribe on King's instructions.

7. Whether evidence of an admission by petitioner Simkins, to the effect that he took a pistol away from someone and beat him up, was so prejudicial that his conviction must be reversed, in spite of the fact that the trial judge promptly instructed the jury to disregard the testimony.

STATEMENT

Petitioners were indicted in the United States District Court for the District of Columbia for violations of 18 U. S. C. 371 and 22 D. C. Code 704 (J. A.

9–26). Two of the petitioners, Monroe and Prather, were police officers of the Metropolitan Police Department of the District of Columbia, and the others were allegedly gamblers involved in operating numbers lotteries in the District of Columbia.

The first count of the indictment charged all petitioners with conspiring to influence the action of Lieutenant Todd O. Thoman, Jr., a member of the Metropolitan Police Department of the District of Columbia assigned to the Morals Division of the Gambling and Liquor Squad (J. A. 9–15). The jury found only the police officers, Monroe and Prather, guilty of the conspiracy (J. A. 2–7). The remaining eighteen counts charged various of the petitioners with substantive offenses of either giving or receiving bribes (J. A. 15–26). Monroe was named in six substantive counts, and found guilty of three; Prather was named in four and found not guilty; Simkins was named in four and found guilty; Taylor and Smith were named in one and found guilty; Anderson was named in five and found guilty of three; King was named in seven and found guilty in one (J. A. 2–8). One of the defendants named in the indictment, Winston, was found not guilty.

Monroe was sentenced on the conspiracy count to imprisonment for twenty months to five years and to payment of a $1,000 fine; a lesser sentence on the substantive counts 11, 14, and 18 was ordered to run concurrently with that imposed on the first count. Prather was sentenced, on the first count, to imprisonment for sixteen months to four years and payment of a $500 fine. As for the other petitioners, Anderson

and Simkins, convicted on more than one count, were sentenced, in gross, to a term of one and one-half to four and one-half years; King, to a term of one to three years; Taylor, fifteen to forty-five months; and Smith, nine months to three years (J. A. 2–8). All convictions were affirmed on appeal (J. A. 102).

1. Lt. Thoman was the chief prosecution witness. At the time in question he was second in command of the Gambling and Liquor Squad of the Metropolitan Police and was charged with the duty of enforcing the gambling and liquor laws of the District (R. 2190–2191).

On October 29, 1953, Lt. Thoman was approached by petitioner Monroe, who was then a Captain on the Metropolitan Police Force and in charge of Precinct Number 12 (R. 205–207). At that time, according to Lt. Thoman:

> We engaged in conversation and Captain Monroe told me it was too bad that I didn't get promoted from my last promotional examination which was held in October—I think it was October 14 or somewhere around that time of the month—and he asked me if I was getting any money from gamblers * * *. He further stated that he hadn't gotten any money from gamblers while he was on the gambling and liquor squad.
>
> He also stated that he was sorry that he didn't. He asked me if I was interested, why he could get me two hundred dollars a month; That a certain gambler was willing to give two hundred dollars a month, and Prather could get me in touch with that gambler's boss * * *.

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> He also stated that he would get in touch with Prather and have Prather get in touch with me (R. 207–208, 211–212).

Petitioner Prather was at that time a detective assigned to Precinct Number 13 of the Metropolitan Police (R. 2191). Prather contacted Lt. Thoman, at Monroe's behest, told him that two gamblers wanted police protection for their gambling activities, and gave him four hundred dollars, and the addresses of four gambling establishments (R. 2110). Lt. Thoman turned the money over to his superiors and told them and the United States Attorney what had happened (R. 218–220).

Lt. Thoman ostensibly continued to engage in the scheme and made regular reports to his superiors. On November 17, 1953, Monroe turned over to Lt. Thoman a match pad containing a list of names, addresses, auto tag numbers, and telephone numbers; all were identified as belonging to gamblers and gambling establishments (R. 225–231). Later Prather explained that the "x's" appearing on the list were "turn in spots" of a numbers operator (R. 231–233).

On April 16, 1954, Prather introduced Lt. Thoman to petitioner Anderson (R. 419–420), who told Lt. Thoman he wanted a guarantee on his office and "drops." He gave Lt. Thoman $500 (R. 432). On April 18, 1954, Anderson stated to Lt. Thoman over the telephone that he had contacted petitioners Winston and King and that they were willing to pay money for protection (R. 501). On May 21, 1954, Anderson made arrangements with Lt. Thoman to have the latter meet Winston (R. 548, 551). At the

meeting the next day, Winston discussed the price to be paid for police protection and said he would have to consult with King about it (R. 585). On May 23, 1954, at a meeting arranged by Anderson between Lt. Thoman, Winston, and King (R. 711), King told Winston to give Lt. Thoman $1,000 for protection, and Winston complied (R. 714).

On June 3, 1954, there was a conversation between Lt. Thoman and King with respect to protection for King's numbers business in Monroe's precinct (R. 861). On the same day, Anderson called Lt. Thoman to inquire about the arrest of petitioner Taylor, and said further that he and several of the other numbers operators were worried (R. 864–865). Later the same day, Lt. Thoman asked Monroe about King, and Monroe said that he knew him. It was then agreed that King and Winston could move into Monroe's precinct if they paid Monroe $200 per month (R. 867).

On June 1, 1954, Lt. Thoman had a telephone conversation with Prather in the course of which Simkins was mentioned several times (R. 758). On June 9, 1954, Anderson called Lt. Thoman about Simkins and requested that Lt. Thoman meet Simkins (R. 879–880). As a result of the conversation, Lt. Thoman met Simkins (R. 2069), who said that he was willing to pay $500 a month for protection for his numbers business (R. 885). During an automobile ride, the two men picked up petitioner Smith (R. 885). Smith told Thoman that he and Simkins were partners in the numbers business and were offering $500 a month, because they knew Thoman could give them

protection (R. 887). Simkins paid Lt. Thoman $500 for protection in the presence of Smith (R. 887). On June 10, 1954, Winston called Lt. Thoman and in their conversation there were references to Simkins and Taylor (R. 974–975). On June 21, 1954, Lt. Thoman met with Simkins and Smith (R. 982).

On June 23, 1954, Lt. Thoman met with Winston who agreed to give him $100 monthly for Monroe (R. 1003). On June 29, 1954, an appointment was made between Lt. Thoman and King but Winston appeared instead of King (R. 1072), gave Lt. Thoman $500 (R. 1077), and discussed the possibility that Taylor might take over part of the payment of the money (R. 1077). On July 1, 1954, Lt. Thoman met with Winston and Taylor; Winston gave Lt. Thoman $100 for Monroe (R. 1097), and Taylor stated that he would pay $500 monthly for protection. He sent it to Lt. Thoman through Winston (R. 1103).

On July 3, 1954, Anderson, accompanied by Simkins, met with Lt. Thoman (R. 1122), and paid him $500 (R. 1126). Simkins stated that he and Smith were no longer partners (R. 1127) and gave Lt. Thoman $500 for protection (R. 1129).

On July 7, 1954, Taylor met with Lt. Thoman and persuaded the latter to take $300 per month until he could get straightened out (R. 1241). For that sum, King and Winston were to be protected as well as Taylor because they were Taylor's partners (R. 1809). On July 9, 1954, Lt. Thoman met Monroe and gave him the $100 he had received from Winston and King (R. 1268). On August 18, 1954, Winston gave Lt. Thoman $600, $100 of which was for Monroe

(R. 1370). On August 19, 1954, Lt. Thoman transferred the $100 to Monroe (R. 1376).

On August 19, 1954, Simkins gave Lt. Thoman $500 (R. 1443) and told him that Anderson was broke (R. 1443). He said that Taylor wanted him to handle his numbers work but that he had refused (R. 1443). On September 9, 1954, Winston gave Lt. Thoman $600, $100 of which was for Monroe (R. 1480). On September 14, 1954, Lt. Thoman gave Monroe $100 (R. 1501). On the same date, Simkins gave Lt. Thoman $500 for protection (R. 1900).

2. Many of the meetings between Lt. Thoman and petitioners were recorded on small spools of very thin magnetized wire by means of a Minifon—a device consisting of a small microphone that can be concealed under a necktie and a pocket-sized recorder powered by batteries. A pre-trial motion to inspect the wire recordings (J. A. 30–31; 36–37) was denied (J. A. 46–47). Nevertheless, the Government served a notice on petitioners and their counsel that sound tapes of the recordings would be played in open court over a period of three days, commencing on December 14, 1954, and invited them to attend (J. A. 49–50). The invitation stated that they could take notes (R. 3409–3410), but could not make stenographic or tape records of the playings because of a possible variance that might occur in the taking of such records (R. 3406). The recordings were played (J. A. 56–62), but petitioners and their counsel refused to attend (R. 3413). Counsel for defendants in other related cases, who did attend the playings, requested playbacks of particular recordings, and these requests were granted (J. A. 62).

On December 15, 1954, petitioners filed a motion to play, hear, record, copy, and/or inspect the originals of the recorded conversations (J. A. 50–51). The Government opposed the motion on the ground, *inter alia*, that petitioners had declined an opportunity to hear the sound tapes of the recorded conversations, which had been preserved on the sound tapes due to the delicate nature of the original wire spools (J. A. 51–55). The Government filed an affidavit certifying the accuracy of the reproductions from the original recordings (J. A. 56–57). After due consideration of these circumstances, the trial judge denied the motion on December 23, 1954 (J. A. 63–64).

At the trial, after Lt. Thoman testified as to each meeting with petitioners, the wire recordings of the meeting was offered into evidence. The recordings were played for the judge, out of the presence of the jury, and she determined their admissibility on an individual basis, the quality of the playback being determinative. Two were excluded (R. 1427, 1042–1043) and the rest were admitted into evidence.[2] The

[2] The wire recordings reflected meetings of Lieut. Thoman with: (1) Detective Prather, April 6 (R. 273–274, 373–392); (2) Detective Prather and Anderson, April 16 (R. 415, 486–494); (3) Anderson, May 20 (R. 504, 673–679); (4) Anderson, May 22 (R. 561, 679–683); (5) Anderson and Winston, May 22 (R. 576, 577, 684–695); (6) Winston and King, May 23 (R. 712, 823–831); (7) Detective Prather, June 1 (R. 756, 832–844); (8) Simkins and Smith, June 9 (R. 883, 884, 941–950); (9) Winston, June 23 (R. 1001, 1048–1057); (10) Winston, June 29 (R. 1073, 1195–1200); (11) Taylor and Winston, July 1 (R. 1093, 1201–1203); (12) Anderson and Simkins, July 3 (R. 1121–1122, 1126–1127, 1204–1208, 1217–1224); (13) Taylor, July 7 (R. 1239, 1329–1331); (14) Capt. Monroe, July 9 (R. 1266, 1331–1343); (15) Winston, Aug. 18 (R. 1367, 1369–1370, 1429–1438).

latter recordings were not played in full at the trial (as they had been at the pre-trial playings to which petitioners and their counsel had been invited) because some of the omitted portions contained telephone conversations of doubtful admissibility and some concerned other cases (R. 1956–1957).

The telephone conversations were monitored and recorded by Lt. Thoman by means of an induction coil apparatus attached to the telephone receiver and connected to the Minifon. In these telephone conversations, to which Lt. Thoman was a party, arrangements were made for meetings where bribes were ultimately passed (R. 571–576). The recordings of these telephone conversations were not introduced into evidence, as already pointed out; nor was their existence brought out by the Government at the trial. Lt. Thoman had in private used them, as well as notes, to refresh his recollection, but stated several times that he had an independent recollection of conversation apart from the recordings (e. g., R. 435, 856).

In instructing the jury, the trial judge refused to give petitioners' requested charge on the law of extortion to the effect that it constituted a full and complete defense (J. A. 71). She did give a full charge on the defense of entrapment (R. 3035–3040). In other relevant portions of her charge to the jury, the trial judge specifically warned them to determine the guilt or innocence of each defendant on the substantive counts solely on the evidence produced with respect to that defendant, and stated that they could consider what a defendant himself said or did as well as conversations occurring in his presence (with ex-

amples) (R. 3030, 3031, 3032). She instructed the jury in detail as to each count (R. 3007–3030), and told the jury that the law in the District of Columbia was that those who aided and abetted in a crime were chargeable as principals, and were just as responsible as the person who committed the physical act which violated the law (R. 3020).

ARGUMENT

1. Although only the police officers, Monroe and Prather, were convicted on the conspiracy count, all the petitioners contend that there was a prejudicial variance between the charge of one conspiracy and the proof which, they claim, established eight conspiracies (No. 246, Pet. 37–49; No. 237, Pet. 7–15). And, on this foundation, the gambler petitioners also contend that the substantive bribery offenses of which each was convicted were separate and distinct transactions, with the result that there was a prejudicial misjoinder of offenses. Both contentions are without merit.

a. Admittedly, the joinder of substantive offenses was proper under Rule 8, F. R. Crim. P. (*supra*, pp. 3–4), if there was one conspiracy. While the court below found it unnecessary to decide that question, we think the evidence clearly did establish one general conspiracy.

Manifestly, as the court below did decide, the police officer petitioners, who were the core of the scheme, were between themselves engaged in one conspiracy which embraced all the payments by all the gamblers to sell police protection to any gambler who would

pay. As to their convictions on the conspiracy count, the only count necessary to support their sentences, there is no issue of variance. See *Ritter* v. *United States*, 230 F. 2d 324, 329 (C. A. 10); *Canella* v. *United States*, 157 F. 2d 470, 478 (C. A. 9).

Even as to the gambler petitioners, the evidence in this case shows that they were part of one general conspiracy. This is not a situation like that involved in *Kotteakos* v. *United States*, 328 U. S. 750, where each briber acted independently through the same source to achieve only his own personal end of obtaining one loan for himself. The evidence, as summarized in the Statement, *supra*, shows that the gamblers were actively working together and assisting one another in their collective end of corrupting the police and buying protection. Their actions in bringing one another in the scheme (which, unlike that in the *Kotteakos* case, involved not one limited final transaction but a continuing plan of regular payments) and in often acting together in making payments show that all realized that it was to the interest of all to corrupt certain officers by regular continuing payments. Anderson's statement (at the time he called Lt. Thoman to inquire about Taylor's arrest) that he and several other numbers operators were worried (R. 864–865) is a graphic illustration of the joint nature of the enterprise. Here, as in *Blumenthal* v. *United States*, 332 U. S. 539, 558, all the petitioners became parties to the large common plan, "joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal."

b. Even assuming *arguendo* that, as to the gambler petitioners, one general conspiracy had not been shown, there would be no reason to reverse their convictions on the substantive counts. In view of their acquittal on the conspiracy count, the only question would be whether their joint trial on the substantive offenses was so prejudicial as to require reversal. In this connection, it is significant that none of the petitioners except Smith made a motion for severance before trial, although there was a motion to dismiss the indictment for misjoinder (J. A. 64–65). They argue that they were in no position to move for a severance until it was shown by the evidence that there was not one conspiracy as alleged (No. 246, Pet. 41), but the fact nevertheless remains that the issue of prejudice must be determined by what actually happened at the trial. *Dunaway* v. *United States*, 205 F. 2d 23, 25 (C. A. D. C.). Clearly, the activities of the petitioners were sufficiently related—particularly since all, to the knowledge of the others, dealt with the same group of officers—so that the joinder of the substantive charges, without more, could not be said to be prejudicial.

Indeed, even in cases where convictions on a general conspiracy charge (as distinguished from convictions on separate substantive offenses) are challenged because proof shows more than one conspiracy, this Court has held that reversal is not necessarily required. *Berger* v. *United States*, 295 U. S. 78. This ruling was explicitly recognized (although the Court refused to extend it) in *Kotteakos* v. *United States*,

328 U. S. at 773–774.[3] Even less would a reversal be required in this case, where the gambler petitioners were acquitted on the conspiracy count. The principal evil condemned in *Kotteakos* was the danger that the jury, pursuant to the trial court's erroneous charge, had used evidence relating to one or more of the several conspiracies against defendants having no part in those particular conspiracies. 328 U. S. at 769–771. No such objection can be made in this case. Here, since the gambler petitioners were convicted only on the substantive counts, their claim of prejudice must rest on the unsupported premise that the jury *disregarded* the trial court's charge.[4] The jury considered the substantive counts under explicit instructions that each defendant should be judged solely on the evidence presented against him. In this connection, the trial judge gave a comprehensive explanation to the jury on how to determine guilt or innocence on each substantive count and referred to the dates and amounts allegedly paid for protection in each count. (See the Statement, *supra*, pp. 13–14). Moreover, the evidence to be considered by the jury as to each petitioner was uninvolved and distinct, and the

[3] The Court said in *Kotteakos*, 328 U. S. at 773–774:

"* * * Leeway there must be for such cases as the *Berger* situation and for others where proof may not accord with exact specifications in indictments. Otherwise criminal conspiracies never could be brought to halt * * *.

"* * * The line must be drawn somewhere. Whether or not *Berger* marks the limit, for this sort of error and case, we are clear that it must lie somewhere between that case and this one.

[4] This Court in *Opper* v. *United States*, 348 U. S. 84, 95, pointed out that "* * * our theory of trial relies upon the ability of a jury to follow instructions * * *."

selectivity of the verdict indicates that the jury did sort and consider the evidence separately. *Maurer* v. *United States*, 222 F. 2d 414, 415 (C. A. D. C.); *Dunaway* v. *United States*, 205 F. 2d 23, 25 (C. A. D. C.).

Under the circumstances, even if the substantive offenses were not part of the one general conspiracy, there is no such showing of prejudice from the joint trial as would warrant reversal of the separate convictions on the separate charges.

2. Petitioners, other than Smith, contend that the trial court abused its discretion in not allowing them to inspect and transcribe the original wire recordings of the conversations had between Lt. Thoman and petitioners (No. 246, Pet. 49–55).

As pointed out in the Statement, *supra*, pp. 11–12, at the time the trial court ruled on petitioners' motion for discovery,[5] the Government had already, on notice to petitioners and their counsel, played the entire contents of these recorded conversations for the benefit of petitioners and their counsel, but the opportunity was declined.[6] Petitioners argue that the opportunity offered to them by the Government was inadequate be-

[5] The court below doubted that these recordings could qualify for discovery under Rule 16 relating to evidence taken from a defendant or others by seizure or by process, but thought petitioners' motions should fairly be construed as invoking Rule 17 (c) relating to evidence to be admitted at the trial (Pet. No. 237, pp. 27–28; Pet. No. 246, p. 86).

[6] The Government explained to the court that the delicate nature of the original wire spools required that the transcribed recordings be played instead of the originals. The truth of the affidavit filed by the Government that the reproduction of the originals was accurate has not been challenged by petitioners.

cause they were not allowed to make stenographic transcripts or sound tapes of the recordings. It seems evident, however, that questions of accuracy of transcription by persons hired by petitioners could well have led into lengthy arguments on collateral matters. Rule 17 (c) provides that the court "may upon their production permit the books, papers, documents or object or portions thereof to be inspected by the parties and their attorneys". It does not provide that the right to inspect necessarily and inevitably includes the right to make exact reproductions of the documents produced. The limitation imposed by the United States Attorney was a reasonable one, which the court in its discretion could have itself made, and by its ruling did in effect adopt. Petitioners, therefore, before their motion was made, had had all the discovery which they could legitimately claim.

Moreover, except for minor portions, the recordings were played in court twice during the trial—once out of the presence of the jury and again before the jury—both times with defense counsel and court reporters present. The portions not used at the trial related to certain telephone conversations which the Government did not wish to use, or to matters concerning other cases (R. 1956–1957). The fact that the Government decided not to use these portions hardly supports petitioners' speculation that the unoffered evidence might have contained material favorable to the defense, particularly since all the recordings had been played in the pre-trial proceedings. Lt. Thoman was on the stand, and subject to cross-examination, but nothing was shown to indicate any

relevancy of the omitted portions of the transcripts. The case, therefore, bears no similarity to *Gordon* v. *United States*, 344 U. S. 414, relied upon by petitioners (No. 246, Pet. 52), where the existence of prior inconsistent statements by the witness, in possession of the Government, was clearly shown.

3. Petitioner Smith contends that his conviction must be reversed because of the admission into evidence of a recording of a conversation he had with Lt. Thoman and Simkins on June 9, 1954, which was incomplete due to the fact that the wire spool ran out during the course of the conversation (No. 237, Pet. 15–18).

The admission of this particular recording was after Lt. Thoman had testified in detail as to the entire conversation which took place on June 9, 1954. The recording was thus not the only evidence of the conversation, but merely independent evidence tending to corroborate the direct testimony of Lt. Thoman. There was no more reason to exclude it because it was partial than there would be to exclude the testimony of a human witness who overheard part of a conversation, the whole of which was described by a party thereto. *United States* v. *Schauerman*, 150 F. 2d 941, 944 (C. A. 3). Whatever may be the proper rule if the partial recording is the entire proof of the conversation,[7] there is no reason to exclude evidence which tends to corroborate the existence of a

[7] *Wright* v. *State*, 79 So. 2d 66 (Ala. App. 1954), cited by petitioner Smith (Pet. No. 237, p. 16), concluded that a partially inaudible recording should be rejected only in the event that it is the only evidence offered as to the occurrence.

conversation otherwise proved. Petitioner argues (No. 237, Pet. 17) that the recording is not subject to cross-examination. But neither is any other physical exhibit, like a shoe that fits a footprint, or blood stains on clothes. Since the whole conversation was proved by the testimony of Lt. Thoman, who was subject to cross-examination, the recording falls into the category of a physical exhibit which corroborates in part the human testimony.

4. Petitioners all contend that the telephone conversations recorded by Lt. Thoman were "intercepted" within the meaning of Section 605 of the Federal Communications Act (*supra*, p. 3) and that therefore, although the recordings were not introduced in evidence, his testimony as to the acts and conversations at the meetings between himself and petitioners, which were arranged by the telephone calls, was inadmissible as "fruit of the poisonous tree" (No. 237, Pet. 18–19; No. 246, Pet. 55–65). The court below did not reach the question of whether Lt. Thoman's recording of telephone conversations to which he was a party constituted an interception within Section 605,[8] because, it held, Lt. Thoman's

[8] The Second Circuit in a divided opinion (*United States* v. *Polakoff*, 112 F. 2d 888) has been the only court of appeals to hold that a recording of a telephone conversation, by one of the parties to it, is an "interception" within the meaning of that term as used in Section 605 of the Federal Communications Act. See also *Reitmeister* v. *Reitmeister*, 162 F. 2d 691, 694. The Sixth Circuit, the Seventh Circuit, and the United States Military Courts of Appeal have held to the contrary. *United States* v. *Rookie*, 229 F. 2d 130, 132 (C. A. 7); *United States* v. *White*, 228 F. 2d, 832, 835 (C. A. 7); *Flanders* v. *United States*, 222 F. 2d 163 (C. A. 6); *United States* v. *DeLeon*, 5 U. S. M. C. A. 747, 19 C. M. R. 43. So

testimony was not the product of the interception, but of what he himself heard, and was therefore admissible (Pet. No. 237, p. 30; Pet. No. 246, pp. 88–89).

Although evidence resulting from clues and leads obtained by illegal interceptions of telephone conver-

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do several district courts. *United States* v. *Pierce*, 124 F. Supp. 264, 265–270 (N. D. Ohio); *United States* v. *Yee Ping Jong*, 26 F. Supp. 69, 70 (W. D. Pa.). Cf. *United States* v. *Guller*, 101 F. Supp. 176, 178 (E. D. Pa.). The District of Columbia Circuit has cited the *Polakoff* decision with approval (*James* v. *United States*, 191 F. 2d 472, 474) by way of dicta, but the issue, although raised in other cases, has not been decided by that circuit. See *United States* v. *Stephenson*, 223 F. 2d 336, holding that the granting of a motion to suppress evidence, which the district court granted because it was obtained by the monitoring of a telephone conversation by one party, was not appealable; and *Sullivan* v. *United States*, 219 F. 2d 760, 762, which involved the question, but turned on the fact that there was no causal connection between the interception and the Government's proof.

This Court's decision in *Goldman* v. *United States*, 316 U. S. 129 indicates that *Polakoff* does not represent the correct interpretation of the term "interception" as used in Section 605. In *Goldman*, this Court held admissible into evidence the record of a telephone conversation secured by means of a dictaphone installed by agents in an adjoining room and unattached to the telephone involved. The *Goldman* decision cites with approval the *Yee Ping Jong* case, *supra*, which *Polakoff* expressly rejected (112 F. 2d at 890), and states: "* * * As has been rightly held, this word [intercept] indicates the taking or seizure by the way or before arrival at the destined place. It does not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender, or after, or at the moment, it comes into the possession of the intended receiver." 316 U. S. at 134.

Furthermore, the thrust of Section 605 is against the interception and *divulgence* of communications. The Government scrupulously refrained from using the recordings as evidence at the trial, and therefore the alleged "interception" was not "divulged" in violation of Section 605.

sations is not admissible (*Nardone* v. *United States*, 308 U. S. 338), the meetings to which Lt. Thoman testified were not the result of the "interception" but of the conversations which he himself had with the other parties. The arrangements for the meetings were made during the conversations themselves without any consideration of the recordings.

Nor does the fact that Lt. Thoman used the recordings to refresh his memory render his testimony the product of illegal action. He testified that he had an independent recollection of the conversations (*e. g.*, R. 435, 856). Had the recordings never been made, Lt. Thoman could have given the same testimony from his personal recollection of the conversations and from notes he made. Petitioners' claimed causal connection between the recordings of the phone conversations and the Government's proof is, in the words of this Court, "so attenuated as to dissipate the taint." *Nardone* v. *United States*, 308 U. S. at 341.

5. Petitioners, other than Monroe, Prather, and Smith, requested a charge defining the offense of extortion and stating that it constituted a complete and full defense to the charges against them (Pet. No. 246, pp. 65–70). This was refused (J. A. 71) but the trial judge did give a full charge on entrapment as a defense (R. 3035–3040).

Petitioners, who did not take the stand, offered no testimony that their payments to the police officers were the result of extortion. The meager evidence to which they point in the petition (No. 246, Pet. 66–70) relates almost entirely to persons other than them-

selves. The statements of Lt. Thoman and Prather referring to Anderson and Taylor (No. 246, Pet. 69) are not indicative of extortion when read in context, for it was established in the course of the same recorded conversation that both men sought out Prather with bribery in mind in return for police protection (R. 309–310, 317–318). There was no evidence that, in approaching Thoman, petitioners were subject to extortion by Thoman. The evidence of Thoman, summarized in the Statement, was to the effect that petitioners indicated willingness to pay him because they knew that, by virtue of his position in the police force, he could give them protection.

In attempting to persuade the trial judge to give a charge on extortion, and in reply to Government counsel's argument that there was no evidence of extortion in the case, petitioners' counsel pointed only to the following statements of Lt. Thoman in cross-examination (R. 2732, 2765, 2770–2771):

> Q. Did it come to your attention, then, sir, as of November 2nd, that money was being extorted from gamblers?
>
> A. On the 2nd of November?
>
> Q. Yes; at that time did you realize that money was being extorted from gamblers?
>
> The COURT. What year is this?
>
> Mr. MITCHELL. 1954.
>
> The WITNESS. No; 1953.
>
> By Mr. MITCHELL:
>
> Q. November 2nd, 1953?
>
> A. That is correct. (R. 1914–1915.)

The court ruled that the above was not susceptible

of the interpretation placed upon it by petitioner's counsel (R. 2765). It is obvious from a reading of the entire colloquy that Lt. Thoman was merely saying that the date was correct, and not that he was aware that money was being extorted.

Under these circumstances, the trial judge was not required to give a charge on a theory not supported by the evidence in the case. Cf. *Bird* v. *United States*, 187 U. S. 118, 132; *Papadakis* v. *United States*, 208 F. 8d 945, 954 (C. A. 9); *United States* v. *Markham*, 191 F. 2d 936, 937–938 (C. A. 7); *Grace* v. *United States*, 4 F. 2d 658, 661–662 (C. A. 5), certiorari denied, 268 U. S. 702.

6. Petitioner King contends that his conviction on count four should not stand since he was but the aider and abettor of Winston, whom the jury acquitted. Under 18 U. S. C. 2,[9] however, the distinction between principals and aiders and abettors has been eliminated, and it is not necessary for the conviction of an aider and abettor that the actual principal be tried or convicted, nor is it material that the actual principal has been acquitted.[10] See *e. g.*, *United States* v.

[9] 18 U. S. C. 2 provides:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

[10] Cases cited by petitioner King (Pet. No. 246, pp. 73–75) are pertinent here only in that they stand for the proposition that there must be proof that a crime was committed before one can be found guilty of aiding in its commission. In this instance, the government proved the commission of the crime King stands convicted of—the passage of a $1,000 bribe to a police officer at King's direction (R. 714).

Klass, 166 F. 2d 373, 380 (C. A. 3); *Von Patzoll* v. *United States,* 163 F. 2d 216, 218–219 (C. A. 10), certiorari denied, 332 U. S. 809; *Beauchamp* v. *United* States, 154 F. 2d 413, 416 (C. A. 6).

A study of the record shows that the jury's verdict is not without a rational basis. The trial court instructed them that under the law of the District of Columbia aiders and abettors are charged as principals (R. 3020). Count four of the indictment does not name King as an aider or abettor, but merely charges that Anderson, Winston, Prather, and King corruptly gave money to Lt. Thoman with the intent to influence his action as a police officer (J. A. 16–17). The evidence showed that Anderson arranged a meeting between Winston and Lt. Thoman (R. 576), that at the meeting Winston said he would have to consult King about the price to be paid for protection (R. 585), and that at the next meeting, arranged by Anderson (R. 711), King told Winston to give Lt. Thoman $1,000 for protection, and Winston complied (R. 714). Prather was not tied into the act charged in count four. The fact that the jury found only King guilty on the count (J. A. 3, 6–7) may be attributed to the fact that they felt Anderson had nothing to do with the bribe, that Winston was an agent and King the actual culprit.

Furthermore, an inconsistency in a verdict does not require that verdicts of guilty as to some defendants be set aside even if it were true that the inconsistency can be explained by no rational considerations. *United States* v. *Dotterweich,* 320 U. S. 277, 279;

American Medical Association v. *United States*, 130 F. 2d 233 (C. A. D. C.), affirmed, 317 U. S. 519.

7. Petitioner Simkins contends that reversible error as to his conviction occurred by testimony to the effect that he had taken a pistol from someone and beaten him (Pet. No. 246, p. 55).

The trial court promptly instructed the jury to disregard the statement (R. 984). In view of the overwhelming evidence against Simkins, such a minor occurrence cannot be said to have unduly swayed the jury against him.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that these petitions for writs of certiorari should be denied.

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SEPTEMBER 1956.

U. S. GOVERNMENT PRINTING OFFICE 1956

FILED
SEP 14 1956
JOHN T. FEY, Clerk

No. 237

IN THE

Supreme Court of the United States

October Term, 1956

ALBERT H. SMITH, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION TO CERTIORARI

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

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REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION TO CERTIORARI

The government joined its brief in opposition here with its brief in opposition in case No. 246.

Because joinder has plagued Smith from the outset of this case which could only be remedied by a severence, we invite the Court's attention to the argument in the government's brief in opposition where it is shown how easy it is even for those skilled in the law to mingle the case of Smith with that of the other defendants. At page 16 the government states:

> "Clearly, the activities of the petitioners were sufficiently related—particularly since all, to the knowledge of the others, dealt with the same group of officers—so that the joinder of the substantive charges, without more, could not be said to be prejudicial."

There is no evidence that Smith ever knew, saw or had any contact or conversation with any of the defendants at the trial except Simkins. Yet the government, above, gives the impression that the evidence showed Smith was hand-in-glove with *all* the other defendants. The evidence shows Smith knew only one defendant, Simkins.

The government relies on *Rule 8, F. R. Cr. P.* to permit joinder.

The very heart of Smith's contention is that severence should have been granted pursuant to *Rule 14, F. R. Cr. P.*

The Court below in its opinion isolated Smith as having properly moved for severance (App. to Petition, p. 31). Similarly, the Solicitor General in opposing certiorari herein concedes that Smith appropriately moved for severance (Govt. brief, p. 16).

Because of the commingling of prejudicial testimony, particularly in a mass trial such as was had here, it was difficult, if not impossible, for Petitioner Smith to make his own case stand on its merits.[1]

His participation in the conspiracy was found by the jury's verdict to be non-existent. Even the allegations of the indictment charge that Smith's alleged participation in the conspiracy was quite minimal. The 26 overt acts of the alleged conspiracy occurred on various dates between October 29, 1953, and September 14, 1954, and concerned Smith only on June 9, 1954, and June 21, 1954. The June 9, 1954, occurrence (overt act No. 14) was the basis of substantive count five which alleged that Smith, Simkins and Anderson bribed Lt. Thoman, a member of the Metropolitan Police Department to be faithless to his trust as a police officer. During the trial, it was contended by the government and the Court charged that Smith was an aider and abettor (T. 3025) of Simkins in the bribery of Thoman. Smith was convicted on this count only.

Except for the conspiracy count, the bribery of Thoman on June 9, 1954, by Simkins, aided and abetted by Smith (count 5), could not have been joined under *Rule 8, F. R.*

[1] Cf. Concurring opinion of Mr. Justice Jackson in *Krulewitch* v. *U. S.*, 336 U. S. 440, 445; *Marcante* v. *U. S.* (CCA 10th) 49 F. 2nd. 158.

Cr. P. with the offense of Anderson on April 16, 1954 (count 2) or his offense on May 20, 1954 (count 3), of King's offense on May 23, 1954 (count 4), or King's offense on June 29, 1954 (count 6), or Anderson's offense on July 3, 1954 (count 7), or Simkins' offense on July 3, 1954 (count 8), or Taylor's offense on July 7, 1954 (count 9), or the bribery of Monroe by Winston and King on July 9, 1954, and August 19, 1954, as alleged in counts 10 and 13, or the receipt of the same bribe by Monroe from Winston and King as alleged in count 11, or the bribery of Thoman by Winston and King on August 18, 1954, and August 19, 1954 (counts 12 and 14), or the bribery by Simkins of Thoman on August 19, 1954, as alleged in count 15, and similarly the offenses alleged against defendants other than Smith in counts 16, 17, 18 and 19. Such a joinder would be outlawed by *Sections (a) and (b) of Rule 8, F. R. Cr. P.* as a misjoinder both of offenses and defendants. Smith simply had nothing whatever to do with these substantive offenses.

Thus there is squarely presented whether in the circumstances of this case the relief as provided in *Rule 14, F. R. Cr. P.* should have been granted Smith.

The character of testimony presented at the trial and recited in the government's brief in opposition to certiorari herein (pages 6 to 12) was inflammatory. It showed venality in the police department which is abhorrent to good government and strikes at the very core of law enforcement. The danger of contamination by a joint trial was real.

With this background, we find it difficult to rationalize the government argument herein that prejudice did not result to Smith. Its brief ignores the realities of the situation in which Smith found himself.

The very nature of the case was such that all of the law's safeguards as provided in *Rule 14, F. R. Cr. P.* should be applied, lest the commingling of prejudicial tes-

timony should react unfavorably to Smith, who was charged with but one substantive offense. The indictment charged eighteen (18) substantive offenses of giving or receiving bribes.

Frequently, it is the character of the crime and the defendants that is one of the controlling factors in ruling on a motion for severance. In a case such as this, the jury may transfer, whether consciously or otherwise, the proof from one count to the other, or from one defendant to the other.

We submit the danger of such transfer to Smith was real. To avoid this danger, he sought a severance. This was done after the opening statement of the prosecutor when first its full impact was ascertained (Tr. 188). This was repeated at the close of the case when we knew the danger existed (Tr. 2651). The very comprehensive charge by the trial Court could not cure the evil then existent.

The burden of defending Smith for aiding and abetting Simkins in the bribery of Thoman on June 9, 1954, as alleged in count five was far greater by reason of the trial of several others at the same time for distinct and separate offenses committed before and after June 9, 1954, as alleged in the remaining seventeen (17) substantive counts.

It was difficult, if not impossible, for Smith in this trial to stand alone in this drama of police corruption extending over a period of eleven months among many people and at variant places in the District of Columbia, while he was charged in one substantive count only[1] and even then the government contended and the Court charged him to be an aider and abettor of Simkins (Tr. 3025).

The case of *Opper* v. *United States*, 348 U. S. 84, 95, to the effect that our theory of trial relies upon the ability of the jury to follow the Court's instructions is subject

[1] He was acquitted on the conspiracy count.

to the severance rule. Otherwise, there would have been no need for the rule.

This Court said in *Kotteakos* v. *United States*, *328 U. S. 750, 773*:

> "When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass."

In this case, the acquittal on the conspiracy count of all the eight defendants, except Monroe and Prather, indicates that Smith, who was in no manner connected with either Monroe or Prather, did not conspire so as to invite a mass trial.

To be tried en masse for a conglomeration of distinct and separate offenses committed by others violates the fundamental principles of a fair trial. It rendered difficult, if not impossible, Smith's ability to make his case stand on its own merits.

We do not contend the jury disregarded the Court's charge as the government argues on page 17 of its brief in opposition herein. We simply contend that it was quite impossible for the jury to ignore the mass of unrelated inflammatory testimony, all of which was unrelated to Smith's activities. In such a situation, reason dictates and experience compels but one conclusion. Prejudice could not be excluded.

Severance was the only remedy and should have been granted to Smith upon his motion which the government herein as well as the Court below concede he made.

The petition should be granted.

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FILED
OCT 31 19
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IN THE

Supreme Court of the United States

October Term, 1956. No. 246.

JOHN B. MONROE, GEORGE C. PRATHER, ROGER W. SIMKINS, CURTIS M. TAYLOR, CHARLES ANDERSON, BURNIE KING,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

PETITION OF ROGER W. SIMKINS FOR REHEARING.

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1956. No. 246.

JOHN B. MONROE, GEORGE C. PRATHER, ROGER W. SIMKINS, CURTIS M. TAYLOR, CHARLES ANDERSON, BURNIE KING,
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VS.

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

PETITION OF ROGER W. SIMKINS FOR REHEARING.

Now comes Roger W. Simkins, one of the Petitioners in the above-entitled case and respectfully prays the Court to grant a rehearing in this cause. On July 12th, 1956, the Petition for Writ of Certiorari was filed. On October the 15th, 1956, certiorari was denied by this Honorable Court.

Petitioner recognizes that this Court should not be burdened with petitions for rehearing, but believes that the following point not previously presented to this Court is substantial, in the public interest and that the effect of the Court's refusal to review the decision of the court below will open the door to widespread abuses of the Congressional policy of Section 605 of the Federal Communications Act and violations of the privacy and the constitutional rights of many citizens. The Court below held that "* * * no use

of the recorded telephone conversations brought about reversible error in this trial" because they were not introduced in evidence. We contend that in fact the telephone recordings were actually used in evidence. *Unplayed does not mean unused.*

If the decision of the Court below is undisturbed, federal employees will be legally permitted to "tap" and record telephone conversations, play them back to other government officials, and at the trial, testify, on direct examination as part of the government's case, to these conversations,[1] *after informing the jury that the telephone conversations had been "tapped" and recorded.*[2]

The trial court will then charge—as the trial court did here—"You are told that the law permits a party to a con-

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[1] A typical example of what occurred during the trial:

"Q. Directing your attention to July 14, 1954, do you recall if anything unusual happened at about 9:10 p. m. of that day?

A. I do.

Q. And what was that?

A. I received a telephone call from Roger W. Simkins.

Q. The Defendant Simkins?

A. Yes, sir.

Q. Do you recall whether or not you spoke to him at that time?

A. I did.

Q. Do you recall the conversation which you had, if any, with Simkins at that time?

A. I do.

Q. What was that conversation?

MR. HAYES: We object. May we ask some preliminary questions?

THE COURT: You may.

MR. HAYES: Captain, was this call in any wise monitored?

THE WITNESS: It was.

MR. HAYES: Was it recorded in the same way which these other conversations were recorded to which you previously testified about?

THE WITNESS: It was." (TR. 1354.)

[2] In the present posture of this case we do not contend that one party to a telephone conversation cannot repeat the conversation at the trial. Our basic contention is that the prosecution cannot tell the jury that the telephone conversation was "tapped," recorded, and replayed.

versation on the telephone to tell others about the conversation and to testify concerning it" (TR. 3034). The court below approved this procedure declaring "* * * assuming interception, no use of the recorded telephone conversations brought about reversible error in this trial. The recordings were not offered or admitted in evidence". 234 F. 2d 49, 56 (D. C. Cir. 1956).

Since evidence obtained by a federal employee in violation of the law may not be used against the victim, the court below attempted to avoid the consequences of "wiretapping" by holding that there was no "use" of the recorded telephone conversations because they were not offered in evidence.

We contend that although the telephone recordings were not physically introduced in evidence they were "used" and, unrecorded, spoke just as loudly in court as though actually played to the jury. Informing the jury that there has been a recording of the telephone conversations by a federal agent[3] is one of the most effective "uses" that can be made of wiretapping. The agent's testimony is fortified and psychologically corroborated by the unplayed wiretap recordings. Permitting the jury to hear such testimony from a witness who the jury knows has listened to the recordings of telephone conversations that have been "tapped" without the petitioner's knowledge or consent is just as effective and, we submit, is equivalent to playing the recording itself.[4]

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[3] The prosecution realized the necessity for such recording evidence.

"Q. Now, on that Thursday morning you were a member of the Metropolitan Police Department, weren't you?

A. I was.

Q. And did you think at that time that Captain Monroe had violated the law when he made a suggestion to you as you have stated?

A. I did.

Q. Why didn't you arrest him?

A. Because I knew that I didn't have enough evidence. It was just a question of my word against his." (TR. 1560.)

[4] Bernstein, in **Fruit of the Poisoned Tree**, 37 **Ill. L. Rev.** 99, 104-105 (1944), noted that distinguishing between testimony which was the

If the petitioner has an indefeasible right not to have his telephone conversations intercepted and divulged, this "use" is reversible error. *Bruno vs. United States*, 308 U. S. 287, 293 (1939).

This Court should not allow the government to flout and evade the prohibitions of Section 605 of the Federal Communications Act and the Fourth and Fifth Amendments by smuggling into its case in chief evidence that telephone conversations have been tapped, thereby illegally bolstering its own witness's testimony. This Court has consistently condemned the use of evidence obtained by unlawful conduct of federal officials. In *Walder vs. United States*, 347 U. S. 62, 64-65 (1954), the Court said:

> "The Government cannot violate the Fourth Amendment [footnote omitted]—in the only way in which the Government can do anything, namely through its agents—and use the fruits of such unlawful conduct to secure a conviction. Weeks v. United States (U. S.) supra. Nor can the Government make indirect use of such evidence for its case, Silverthorne Lumber Co. v. United States, 251 U. S. 385, 64 L. ed. 319, 40 S. Ct. 182, 24 A. L. R. 1426, or support a conviction on evidence obtained through leads from the unlawfully obtained evidence, cf. Nardone v. United States, 308 U. S. 338, 84 L. ed. 307, 60 S. Ct. 266. All these methods are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men."

And in *Irvine vs. California*, 347 U. S. 139, 151 (1954), Justice Douglas dissenting stated.

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result of a refreshed recollection and that which is merely a verbal recitation of the contents of the recording does not accord with theory. He suggests this separation would require a miracle of psychiatry in which the witness is his own untrained psychiatrist. Under these circumstances the prosecution is not using the "fruit of the poisoned tree" but is using the tree itself.

> "I protest against this use of *unconstitutional* evidence. It is no answer that the man is doubtless guilty. The Bill of Rights was designed to protect every accused against practices of the police which history showed were oppressive of liberty. The guarantee against unreasonable searches and seizures contained in the Fourth Amendment was one of those safeguards. In 1914 a unanimous Court decided that officers who obtained evidence in violation of that guarantee could not use it in prosecutions in the federal courts. Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, 34 S. Ct. 341, L. R. A. 1915B 834, Ann. Cas. 1915C1177. Lawless action of the federal police, it said, 'should find no sanction in the judgments of the courts * * *.' Id. 232 U. S., p. 392."

This Court has the power to institute on its initiative reforms in the federal practice as to the admissibility of evidence in criminal trials in federal courts. *McNabb v. United States*, 318 U. S. 383 (1933); *Upshaw v. United States*, 335 U. S. 410 (1948) (Particularly at 414, dissenting opinion); *Rea v. United States*, 350 U. S. 214 (1956).

We submit that Congressional policy and the Constitutional guarantee of a fair trial demands a pronouncement by this Court that federal agents cannot corroborate their own testimony in court by informing the jury that telephone conversations with the defendants have been intercepted, recorded, and replayed.

It is important that the novel rule laid down by the Court of Appeals—that this "use" of recorded telephone conversations is not reversible error—be not permitted to stand as a guide for the future. The truly disturbing feature of the present case is that society will now be continually plagued with unauthorized wiretapping.

WHEREFORE your Petitioner respectfully prays that rehearing be granted, that the order denying certiorari be vacated and that certiorari be granted.

Respectfully submitted,

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Penna.,
Counsel for Petitioner Roger W. Simkins.

CERTIFICATE OF COUNSEL.

I certify that this Petition is presented in good faith and not for delay and is restricted to substantial grounds available to petitioner not previously presented.

JACOB KOSSMAN.

October 1956.

FILED
NOV 1 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 246

CHARLES ANDERSON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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The petitioner, Charles Anderson, prays that this Court grant a rehearing of its order of October 15, 1956 denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit as prayed in the petition.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

Petitioner is fully aware of the fact that petitions for rehearing are not favored and not frequently granted, but petitioner believes that the reasons to be urged herein will transcend the general rule in this regard. Other substan-

tial grounds for the allowance of the writ, available to petitioner though not previously presented, should be submitted to this Court for determination because they involve serious questions as to the right of a defendant in a criminal case in a Federal Court to a "fair trial" under the Constitution and because the questions are important in the administration of criminal justice in Federal Courts, this Court should exercise its power of supervision under the doctrine of the McNabb case (*McNabb* v. *U.S.*, 318 U.S. 332).

I.

Whether the Directive in Rule 41(e) F.R.C.P. Must be Followed by District Courts According to the Usual and Generally Accepted Meaning of the Language Employed Insofar as the Inadmissibility of Suppressed Evidence "At Any Hearing or Trial" Is Concerned?

At the outset it must be borne in mind that this question concerns itself *only* with the problem of the interpretation of that portion of Rule 41(e) F.R.C.P. that provides in pertinent part:

> "If the motion (to suppress) is granted, the property shall be restored unless otherwise subject to lawful detention, and it Shall Not Be Admissible in Evidence At Any Hearing or Trial." (Emphasis supplied).

At the trial of this cause in the District Court, over the the objection of the petitioner, the witness, Captain Thoman, testified as to matters the knowledge of which he had gained as a result of an illegal search and seizure. In another proceeding wherein petitioner was not a party, the District Court had entered an order suppressing evidence gained through the illegal search and seizure pursuant to Rule 41 F.R.C.P. The use of the knowledge gained by Thoman as a result of the illegal search is prohibited in the same fashion as the introduction of the actual physical property was prohibited. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385.

Thoman testified concerning Government Exhibit 1a which was a list of names, addresses and telephone numbers which had been handed to him by the defendant Monroe. (R. 222) The defendants' objections were overruled and Thoman testified, when asked by the prosecutor, that on the list he recognized the name "American Florist, 731 11th Street, N.W." When asked what was that name and address, over objection, he stated that it was a "gambling joint". (R. 228) Petitioners' motion for a mistrial was denied. Because of the nature of the case (See statement of facts in the petition for certiorari) this testimony was very prejudicial to petitioner. On cross-examination he admitted that he predicated his conclusion that 731 11th Street, N.W. was a "gambling joint" upon the evidence seized in the premises during a raid (the same evidence that had been previously ordered suppressed by District Court) (R. 1918). The prosecutor, Mr. Troxell, knew of the suppression because he had been government counsel in that prior proceeding. (R. 1918). The trial court refused to strike this testimony or to declare a mistrial (R. 1920-1923).

It is plain, therefore, that Captain Thoman's knowledge came within the purview of the *Silverthorne* decision, supra. He had participated in the raid and had obtained the prejudicial knowledge as a result of the government's own wrong.

This Court held in *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793, "furthermore the search and seizure here, if such it can be called in any true sense, was not the kind that has prompted this Court to hold that the government has by wrongful conduct of its officers forfeited all opportunity to make use of evidence unlawfully seized .... We hold that dismissal of the Grand Jury because no women were on it is no sufficient reason for holding that the government is barred from making use of the summoned documents." That case, unlike the instant case, involved no question of the interpretation of Rule 41(e)

and was a *civil case*, a fact mentioned in the decision, at least eight times, no doubt, by way of emphasis. A few months before the *Wallace & Tiernan Co.* decision, supra, this Court in *McDonald* v. *United States*, 355 U.S. 451, dealt with a problem somewhat similar to the one here presented, holding that the denial of McDonald's motion to suppress "was prejudicial to Washington as well." Research of counsel has disclosed but one case upon the point here raised, *United States* v. *Janitz*, 6 F.R.D. 1, decided by the United States District Court for the District of New Jersey. (The United States appealed, but the appeal was dismissed for lack of jurisdiction, *United States* v. *Janitz*, 161 F. 2d. 19.) In that case before trial the motion of co-defendant Conklin to suppress had been granted and the case dismissed as to Conklin. At the trial Janitz and the remaining defendants moved to suppress the same evidence upon the basis of the language contained in Rule 41(e) F.R.C.P. which provides that such evidence shall not be admissible in evidence "*at any hearing or trial*". Because petitioner believes that the decision in that case treats the exact question here raised, the petitioner quotes the same somewhat fully below.[1]

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[1] "An examination of the minutes of the proceedings which preceded the adoption of this rule, while coming somewhat close to the problem involved, fails to furnish enlightenment. It appears that under the rule as suggested in the first and second preliminary drafts it was provided that such evidence "shall not be admissible in evidence at any hearing or trial *of the proceeding in connection with which the seizure occurred.*" A comparison of these preliminary drafts with the rule as adopted shows that the limitation above emphasized was finally eliminated. Prior to the adoption of this rule the law was firmly established in seizure unless he had a proprietary interest in the property wrongfully seized. *Mabee* v. *United States* (3rd cir.) 60 F. 2d. 209; *United States* v. *White*, 332 U.S. 624. The remaining defendants in the instant case had no interest whatever in the property and under the law *as it was prior to the new rule*, they could not be heard to complain. While the United States Supreme Court "has never been called upon to decide the point, the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in

It is obvious that the language contained in Rule 41(e) is very plain. This Court recently held that the District Courts have power to enforce the Federal Rules of Criminal Procedure to the end that a Federal Officer may be enjoined from testifying as to evidence suppressed under Rule 41(e) in a state proceeding. *Rea* v. *United States*, 350 U.S. 214; 100 L. Ed. 213. Though the problem is different, the rationale is identical to that here presented. (See also: Nos. 131 and 133, Oct. Term 1956, *Giglio, et al.* v. *U. S.*, certiorari granted Oct. 15, 1956).

If, indeed, the questioned language in Rule 41(e) has a meaning other than the usual and generally accepted meaning, this Court should exercise its power of supervision by granting certiorari and interpreting the rule.

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evidence of that which was seized." *Goldstein* v. *United States*, 316 U.S. 114 at page 121. This was the view prior to the Congressional enactment of Rule 41 which places the rule in the sphere of legislation transcending a mere rule of court.

"This court cannot harmonize the above opinion with the provision of the rule that such evidence cannot be used at any hearing or trial. To do so would cause the court to enter the legislative field. The rule of construction is that language of this type shall be given its usual and generally accepted meaning. Whether or not the words in question vest any right in anyone to complain is beside the point. The rule must be construed as a restriction on the power of the court to permit the introduction of such tainted evidence. And, if prior to or in the course of a trial the issue is raised, the court must follow the Act of Congress. Indeed, it would seem to be the duty of the court itself to raise it. Nor is this altogether undesirable since if the government, through its agents and without justification, carried away, or seized property unlawfully, it cannot be and ought not to be permitted in justice or sound reason to gain any advantage whatever from such illegal conduct. The motion to suppress as to the remaining defendants is granted." *United States* v. *Janitz*, 6 F.R.D. 1.

II.

Whether the Admission Into Evidence of the Opinion of the United States Attorney as to the Sufficiency of the Evidence Against Petitioners Was So Manifestly Unfair as to Vitiate the Trial Under Amendment V?

Insofar as counsel have been able to ascertain through diligent research, there has never been decided by this Court a question involving the government's presentation of the United States Attorney as a witness who expressed an opinion as to the sufficiency of the evidence against a defendant in a criminal case.

At the trial below the Honorable Leo A. Rover, then States Attorney for the District of Columbia (now Chief Judge, Municipal Court of Appeals for the District of Columbia) testified for the government. It appears clearly from the record that Judge Rover was called for the sole purpose of prejudicing petitioners by having him give opinion evidence as to the sufficiency of the evidence against petitioners. To appreciate the effect of his testimony upon the jury it is necessary to consider the fact that the very presence of the then chief law enforcement official in the District on the stand created in the mind of each juror an interest in what he had to say such as could have been created by perhaps no other possible witness. The Honorable Leo A. Rover is a man of forceful and magnetic personality and in the District of Columbia his name is almost legendary in the field of criminal law. His reputation was that of a man having an unrivaled knowledge of criminal law. He was a man of immense personal popularity in the District, then serving a second term in the office of the United States Attorney having served a first term about 25 years prior to the second. His subsequent appointment as Chief Judge of the Municipal Court of Appeals was one of the most popular in the history of the District. Against this background there was no need to qualify this witness as an expert, he was qualified in the mind of each juror before

he took the stand. The prosecution knew this. The complete testimony of Leo A. Rover is contained in Pages 2385 through 2393, inclusive of the record showing the repeated objections of petitioners; the most pertinent portions are quoted below:

2385 Q. And what is your occupation, sir? A. I am the United States Attorney for the District of Columbia.

* * * * * *

2388 Q. Now, who was responsible for the duration of the investigation in this case?

* * * * * *

The Witness: I was.

* * * * * *

Q. Will you kindly give your reasons?

* * * * * *

2389 The Witness: The report as given to me by Thoman indicated to my mind . . . .

* * * * * *

2390 The Witness: Why the duration of the matter? Because it was a case that was going to require considerable investigation for development. It was a case that had not matured at that time.

* * * * * *

The Witness: The case had not matured at that time. It was a case that required further investigation and further development. It was a case that from the very nature of which other people were coming into the case, in my judgment. And my instructions were that . . . .

* * * * * *

2391 The Witness: It was a case into which additional men were coming from time to time in the same plan.

* * * * * *

2392 The Witness: AND SO, UNTIL THERE WAS SUFFICIENT EVIDENCE PRESENTED TO ME THAT INDICATED DETERMINATION OF THIS PLAN, I KEPT THE CASE ALIVE. (Emphasis supplied).

* * * * * *

Cases on this point are almost non-existent except for one recent case exactly in point—*New Jersey* v. *Landeros*, 118 A. 2d. 521. In that case defense counsel during cross-examination of the Chief of Police asked the Chief's opinion as to the guilt of accused. The prosecutor urged or directed the witness to answer. The witness said, "He is as guilty as Mrs. Murphy's pet pig." The Court of Appeals held that because the Chief of Police was the chief law enforcement officer, his opinion would have great weight in the eyes of the jury and that even though defense counsel asked for the answer received, the chief prosecutor knew the effect of such an opinion upon the jury such that there was such an utter lack of "fairness" in the proceeding that the conviction must be reversed. Petitioner says that the conduct of the prosecution in his case was completely unfair in eliciting the "expert" opinion as to the sufficiency of the evidence against him and that, as a result he was deprived of a "fair trial" and "due process of law" under Amendment V.

This Court in *Berger* v. *United States*, 295 U.S. 78; 79 L. Ed. 1314 at Page 1321 with respect to the conduct of a United States Attorney said, "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, *especially assertion of personal knowledge*, are apt to carry much weight against the accused when they should properly carry none." (Emphasis supplied). In this case there was no mere assertion of knowledge but the actual taking of the stand by the United States Attorney and the expression of an

opinion as to the sufficiency of the evidence. Surely this was the very epitome of unfairness.

As this Court held in *McNabb* v. *United States*, 318 U.S. 332, "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force". Petitioner calls upon this Court to establish by instrument of this case a rule of evidence prohibiting conduct on the part of a United States Attorney such as was exhibited in this case.

III.

The petitioner, Charles Anderson, adopts the petition for rehearing filed herein by the petitioner Roger W. Simpkins, and prays that the same be considered a part hereof.

Conclusion

Despite all of the limitations inherent in a petition for rehearing, petitioner prays that this Court give consideration to the setting of standards for a "fair trial" in a federal court by the granting of a rehearing herein and that upon such rehearing a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

De Long Harris
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Counsel for Petitioner

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

De Long Harris
Counsel for Petitioner